Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

L.M.M.,

Petitioner,

v.

E.N.O.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts violated the Separation of Powers doctrine of the Massachusetts Declaration of Rights in *E.N.O. v L.M.M.* by granting, without Legislative authority, visitation between the Petitioner's biological minor child, properly in the custody of the Petitioner, and the Respondent, who is neither the biological nor adoptive parent.

II. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts violated the Petitioner's fundamental right to rear her biological child without State interference by granting, without the Petitioner's consent, visitation between the Petitioner's minor child and the Respondent.

III. Whether the lower court violated the Petitioner's Due Process rights by preventing the Petitioner the right to conduct an evidentiary hearing and the opportunity to cross-examine the guardian ad litem before the court granted visitation between the Petitioner's biological child and the Respondent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THE MASSACHUSETTS SUPREME JUDICIAL COURT VIOLATED THE SEPARATION OF POWERS DOCTRINE ENUMERATED IN THE MASSACHUSETTS DECLARATION OF RIGHTS BY GRANTING VISITATION, WITHOUT EXPRESS STATUTORY AUTHORITY, BETWEEN THE PETITIONER'S BIOLOGICAL MINOR CHILD, PROPERLY IN THE CUSTODY OF THE PETITIONER, AND THE RESPONDENT, WHO IS NEITHER THE BIOLOGICAL NOR ADOPTIVE PARENT 8

A. The Massachusetts Supreme Judicial Court Unconstitutionally Expanded Judicial Authority By Granting Visitation of a Minor Child to a Person, Who Is Neither the Biological Nor Adoptive Parent, Without Statutory Authority But Rather Through its Equity Jurisdiction 8

B. Violating the Separation of Powers Doctrine Compels this Court to Reverse the Massachusetts Court's Ruling 21

TABLE OF CONTENTS – Continued

Page

II. THE MASSACHUSETTS SUPREME JUDICIAL COURT VIOLATED THE PETITIONER'S FUNDAMENTAL RIGHT TO REAR HER BIOLOGICAL CHILD WITHOUT STATE INTERFERENCE BY GRANTING, WITHOUT THE PETITIONER'S CONSENT, VISITATION BETWEEN THE PETITIONER'S MINOR CHILD AND THE RESPONDENT 23

III. THE PROBATE COURT VIOLATED THE PETITIONER'S DUE PROCESS RIGHTS BY PREVENTING THE PETITIONER THE RIGHT TO CONDUCT AN EVIDENTIARY HEARING AND THE OPPORTUNITY TO CROSS-EXAMINE THE GUARDIAN AD LITEM BEFORE THE COURT GRANTED VISITATION BETWEEN THE PETITIONER'S BIOLOGICAL CHILD AND THE RESPONDENT 26

IV. THIS CASE IS OF NATIONAL SIGNIFICANCE TO RESOLVE INCONSISTENT DECISIONS AMONG LOWER COURTS AND IMMEDIATE IMPORTANCE TO THE PUBLIC 28

CONCLUSION 30

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

A.C. v. C.B., 113 N.M. 581 (1992).....18, 29

Adoption of Tammy, 416 Mass. 205, 619 N.E.2d 315 (1993).....4

Alison D. v. Virginia M., 77 N.Y.2d 651, 572 N.E.2d 27 (1991).....17, 29

Board of Regents v. Roth, 408 U.S. 564 (1972).....27

C.M. v. P.R., 420 Mass. 220, 649 N.E.2d 154 (1995).....5, 6, 18

Collins v. Guggenheim, 417 Mass. 615, 631 N.E.2d 1016 (1994).....4

Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945).....20

Cooper v. Merkel, 470 N.W.2d 253 (S. Dakota 1991).....17

Enos v. Correia, 38 Mass. App. Ct. 318, 647 N.E.2d 1215 (1995).....15, 18, 19

Field v. Clark, 143 U.S. 649 (1892).....19

Freeman v. Chaplic, 388 Mass. 398, 446 N.E.2d 1369 (1983).....18, 24, 25

Gilmore v. Gilmore, 369 Mass. 598, 341 N.E.2d 655 (1976).....27

Griswold v. Connecticut, 381 U.S. 479 (1965).....23, 26

Holtzman v. Knott, 193 Wis. 2d 649, *cert. denied*, 516 U.S. 975 (1995).....17, 22, 24, 29

J.A.L. v. E.P.H., 452 Pa. Super. 78 (1996).....17, 29

Lihs v. Lihs, 504 N.W.2d 890 (Iowa 1993).....17

TABLE OF AUTHORITIES – Continued

Page

Liston v. Pyles, 1997 WL 467327 (Ohio 1997) 17, 29

Loving v. United States, 517 U.S. 748 (1996) 19

Michael H. v. Gerald D., 491 U.S. 110 (1988) 19, 23, 25, 26

Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise Inc., 501 U.S. 252 (1991) 9, 21

Meyer v. Nebraska, 262 U.S. 390 (1923) 23

Missouri v. Jenkins, 515 U.S. 70 (1995) 11, 12, 16

Moore v. City of East Cleveland, 431 U.S. 494 (1977) .. 23, 25

Music v. Rachford, 654 So. 2d 1234 (Fla. Dist. Ct. 1995) 17, 29

New York Insurance Co. v. Bangs, 103 U.S. 435 (1880) 13, 14

Opinion of the Justices, 365 Mass. 640, 309 N.E.2d 476 (1974) 9, 21

Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534, 668 N.E.2d 1298 (1996) 20

Plaut, et ux. v. Spendthrift Farm, 514 U.S. 211 (1995) 9

Prince v. Massachusetts, 321 U.S. 158 (1944) 24, 25

Skinner v. Oklahoma, 316 U.S. 535 (1942) 23

Smith v. Organization of Foster Families for Equity and Reform, 431 U.S. 816 (1977) 25, 27

Snyder v. Massachusetts, 291 U.S. 97 (1934) 23

Stanley v. Illinois, 405 U.S. 645 (1972) 25

TABLE OF AUTHORITIES – Continued

Page

Van v. Zahorik, 597 N.W.2d 15 (1999) 16

V.C. v. M.J.B., 319 N.J.Super. 103, 725 A.2d 13 (1999) 17, 29

Youmans v. Ramos, 429 Mass. 774, 711 N.E.2d 165 (1999) 14

West v. Superior Court of Sacramento, 59 Cal. App. 4th 302, 69 Cal. Rptr. 2d 160 (1997) 16, 17, 29

Wilcox v. Trautz, 427 Mass. 326, 643 N.E.2d 141 (1998) 20

Wisconsin v. Yoder, 406 Mass. 205 (1972) 23, 24

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article I, Section 1 1

U.S. Constitution, Article III, Section 1 ..... 1, 10

U.S. Constitution, Article III, Section 2 ..... 2, 10

U.S. Constitution, Article VI, Section 2 2

U.S. Constitution, Amendment V 2, 23

U.S. Constitution, Amendment IX 2

U.S. Constitution, Amendment XIV, Section 1 ..... 2, 23

Massachusetts Declaration of Rights, Article 30 ..... 3, 9

UNITED STATES STATUTES

28 U.S.C. §1257 1

TABLE OF AUTHORITIES – Continued

Page

MASSACHUSETTS STATUTES

M.G.L. c. 119, §23 15

M.G.L. c. 119, §39D 15

M.G.L. c. 208, §28 15

M.G.L. c. 209A 4

M.G.L. c. 209C, §5 15

M.G.L. c. 209C, §10 15

M.G.L. c. 215, §6 ..... 7, 10, 13, 18

OTHER AUTHORITIES

JOHN DEWITT GREGORY, Note, *Blood Ties: A Rationale for Child Visitation by Legal Standards*, 55 WASH & LEE L. REV. 351 (1998) 19

The Federal Farmer No. 3, Oct. 10, 1787 11

The Federal Farmer No. 15, Jan. 18, 1788 11

The Federalist No. 78 ..... 9, 10, 12, 22

The Federalist No. 83 12

2 The Complete Anti-Federalist 322 (H. Storing ed. 1981) 11

3 W. Blackstone, Commentaries on the Laws of England, 436 (1768) 11

PETITION FOR WRIT OF CERTIORARI

L.M.M. petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts.

OPINIONS BELOW

This petition seeks review of the opinion of the Massachusetts Supreme Judicial Court reported as *E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886 (1999), which is reprinted in the Appendix to this Petition at App. 1-29. The Orders of the Single Justices of the Massachusetts Appeals Court and the Orders of the Dukes County Division of the Probate and Family Court Department are unreported and are reprinted at App. 58-72.

JURISDICTION

The Judgment of the Massachusetts Supreme Judicial Court was entered on June 29, 1999. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 1 provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Constitution of the United States, Article III, Section 1 provides, in relevant part:

> The judicial Power of the United States, shall be vested in one supreme court, and in such

> inferior Courts as the Congress may from time to time ordain and establish. . . .

Constitution of the United States, Article III, Section 2 provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States. . . .

Constitution of the United States, Article VI, Section 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Constitution of the United States, Amendment V provides, in relevant part:

> No person shall. . . . be deprived of life, liberty, or property, without due process of law . . .

Constitution of the United States, Amendment IX provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Constitution of the United States, Amendment XIV, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

> States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

Massachusetts Declaration of Rights, Article 30 provides:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.

STATEMENT OF THE CASE

Petitioner L.M.[1] and Respondent E.O. were involved in a lesbian relationship for approximately thirteen years until their separation in May, 1998. While living in Maryland, L.M. became pregnant through artificial insemination and gave birth to B. on February 23, 1995 in Washington D.C.

Thereafter, on June 5, 1995, while still living in Maryland, the parties executed a "Co-Parenting Agreement", which did not specifically address adoption but purported to give E.O. the right to "do everything legally possible to create a legal relationship . . . and to place the child in the same position as a biological child . . . for purposes of determining custody, visitation, support and inheritance rights" and to share custody and visitation of

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[1] Consistent with an Impound Order, Petitioner is hereinafter referred to as "L.M.", the Respondent as "E.O." and the child as "B."

him. The Agreement further provided that "[e]ach party acknowledges and understands that there are legal questions raised by the issues involved in this Agreement which have not been settled by statute or court decisions." It further selected the law of Maryland as the applicable law in construing the alleged Agreement and provided "[t]he parties acknowledge that current state law does not clearly recognize the rights of a nonbiological parent to stand as a de facto parent in relation to the child."

After B.'s birth, the parties lived together for three years, moving to Massachusetts in September, 1997. It is undisputed that no formal action was taken for E.O. to adopt B.[2] It is also undisputed that the parties were not married.[3]

By May, 1998 the parties' relationship ended amidst allegations that E.O. posed a threat of harm to both L.M. and B. In mid-May, E.O. moved out and L.M. declined E.O.'s requests for further contact either with herself or B. L.M. obtained a restraining order from the Dukes County District Court pursuant to M.G.L. c. 209A, alleging E.O. had shaken B., acted erratically and placed B. and herself in danger of harm. This order was later dismissed by the Dukes County Probate and Family Court.

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[2] Massachusetts recognizes that E.O. would have been allowed to adopt B. with L.M.'s consent. *Adoption of Tammy*, 416 Mass. 205, 619 N.E.2d 315 (1993).

[3] Massachusetts does not recognize same-sex marriages. Massachusetts also does not consider cohabitation as creating incidents of a marital relationship in the absence of a legal solemnization of the marriage. *Collins v. Guggenheim*, 417 Mass. 615, 617-18, 631 N.E.2d 1016, 1017 (1994).

On June 29, 1998, E.O. filed an equity complaint in the Dukes County Probate and Family Court, seeking to specifically enforce the "Co-Parenting Agreement" and alleged promises for her to adopt and have shared legal and physical custody of B. She also sought to enforce rights of visitation and estop L.M. from denying her relationship with B.

L.M. filed a Motion to Dismiss, contending that E.O. never adopted the child and that she had no standing to bring an action for custody and visitation. The Probate Court denied the Motion to Dismiss, despite acknowledging that this case is one of first impression in the Commonwealth of Massachusetts, and that "there are no statutory provisions specifically addressing the standing of a non-biological parental figure with regard to continued contact with the child." L.M. subsequently appealed this denial.

On August 13, 1998, the parties argued, amongst other motions, E.O.'s Motion for Visitation and Motion for Full Evidentiary Hearing. Although oral argument was heard, the court declined to conduct an evidentiary hearing but allowed temporary visitation between E.O. and B. (App. 58-66). L.M. filed a Petition for Interlocutory Relief from this order. After hearing, the Single Justice of the Massachusetts Appeals Court vacated the order and stayed visitation pending a trial on the merits. (App. 67-68). In support, the Single Justice cited *C.M. v. P.R.*, 420 Mass. 220, 649 N.E.2d 154 (1995) as controlling.[4]

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[4] The Massachusetts Supreme Judicial Court stated, in similar facts as in the present case: "[w]hen a man is neither the biological or adoptive father nor married to the mother, there is little authority that supports a claim of right to visitation or

E.O. subsequently filed a Petition for Relief seeking to reverse the Appeals Court order and reinstate the order for temporary visitation. The Single Justice allowed the petition, stating that the case of *C.M. v. P.R.* is distinguishable, that temporary visitation will preserve the status quo, and the "Probate judge acknowledged that [E.O.'s] lawsuit has a reasonable chance of success on the merits." (App. 69-70).

On November 4, 1998, the Dukes County Probate and Family Court issued another temporary order allowing E.O. visitation with B. twice a week, at two different locations. (App. 71-72). The court once again refused to conduct an evidentiary hearing on the issue of visitation, nor did the court afford L.M. the opportunity to cross examine the court appointed guardian ad litem, apparently, instead, relying on an acknowledged incomplete investigation by the guardian ad litem, who did not testify nor have the opportunity to speak with B.'s counselor. L.M. promptly appealed the order to the Single Justice and sought a stay of visitation on the grounds, *inter alia*, that the issue of whether E.O. has standing to bring her claim has never been addressed by the Massachusetts Appeals Court.

Thereafter, the Supreme Judicial Court of the Commonwealth of Massachusetts granted further appellate review on the issue of the Probate Court's jurisdiction to order temporary visitation between a child and the child's "de facto" parent and whether the Probate Court erred by failing to hold an evidentiary hearing before ordering temporary visitation. In its decision, four of the

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custody." *C.M. v. P.R.*, 420 Mass. 220, 224, 649 N.E.2d 154, 155 (1995).

six Justices of the Supreme Judicial Court, while conceding that there is "no statute expressly permitting the order of visitation privileges to one who stands in a parent-like position," rationalized that the source of the Probate Court's authority in this matter is through its "equity jurisdiction," conferred upon them by M.G.L. c. 215, §6, which the Court found extends the right to authorize visitation with a child. The majority opinion further opined that its "duty as parens patriae necessitates that its equitable powers extend to protecting the best interests of children in actions before the court. . . . " and that the best interests of children include examining the child's relationship with both his legal and "de facto" parent. After concluding that E.O. is a "de facto" parent (and recognizing this doctrine for the first time in Massachusetts), the four Justices affirmed the lower court's order granting visitation based on the "best interests of the child."

The Court additionally found that the Probate Court's refusal to hold an evidentiary hearing and allow L.M. the opportunity to cross examine the guardian ad litem prior to ordering the temporary visitation was not erroneous because the court solicited a preliminary report of the GAL and "gave both parties an opportunity to be heard on the report and the motion for visitation" and that the visitation order is temporary in nature.

L.M. is in agreement with the vigorous dissent by one-third of the Massachusetts Supreme Judicial Court that the Probate Court's visitation order "was wholly without warrant in statute, precedent, or any known legal principle;" that the Supreme Judicial Court's opinion "is a remarkable example of judicial lawmaking . . . greatly expanding the court's equity jurisdiction with respect to

the welfare of children and adopts the hitherto unrecognized principle of de facto parenthood as the sole basis for ordering visitation . . . expanding judicial authority and making an addition to the common law. . . . "

L.M. further believes, as did the dissent, that her fundamental right to raise her child without State intrusion (ordering child visitation with her child against her consent), where there is no allegation that B's health or safety has been jeopardized, violated her Due Process rights. She also contends her inability to present evidence and cross examine the GAL prior to the temporary visitation order violated her right to Due Process. She therefore respectfully seeks review by the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

I. THE MASSACHUSETTS SUPREME JUDICIAL COURT VIOLATED THE SEPARATION OF POWERS DOCTRINE ENUMERATED IN THE MASSACHUSETTS DECLARATION OF RIGHTS BY GRANTING VISITATION, WITHOUT EXPRESS STATUTORY AUTHORITY, BETWEEN THE PETITIONER'S BIOLOGICAL MINOR CHILD, PROPERLY IN THE CUSTODY OF THE PETITIONER, AND THE RESPONDENT, WHO IS NEITHER THE BIOLOGICAL NOR ADOPTIVE PARENT.

A. The Massachusetts Supreme Judicial Court Unconstitutionally Expanded Judicial Authority by Granting Visitation of a Minor Child to a Person, Who Is Neither the Biological Nor Adoptive Parent, Without Statutory Authority But Rather Through its Equity Jurisdiction.

In its most basic form, the concept of a separation of powers mandates that the legislative branch is possessed

of power to "prescribe the rules by which the duties and rights of every citizen are to be regulated, but the power of the interpretation of the laws would be the proper and peculiar province of the courts." *See Plaut, et ux. v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222 (1995) (citing The Federalist No. 78, pp. 523, 525). *See Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("[t]ime and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches").

Similarly, Massachusetts' version of the Constitution "is in a most explicit form, and on its face calls for a complete and rigid division of all powers among the three branches." *Opinion of the Justices*, 365 Mass. 639, 640, 309 N.E.2d 476, 478 (1974). Article 30 of the Massachusetts Declaration of Rights specifically provides:

> [i]n the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men. (App. 34).

Thus, the Massachusetts judicial branch must refrain from exercising will instead of judgment.

In the present case, the Massachusetts Supreme Judicial Court (hereinafter referred to as the "S.J.C.") recognized that no Massachusetts statute exists that specifically authorizes the court to grant visitation between a person in the Respondent's position (one who is neither the biological nor adoptive parent) and the

minor child, properly in the custody of the child's biological parent. (App. 5). Nonetheless, four of the six Justices of the S.J.C. opined that the Probate Court's equity jurisdiction, by interpreting M.G.L. c. 215, §6, provides the court with authority to grant visitation with a child because the court's jurisdiction "is broad, extending to the right to authorize visitation with a child." (App. 6).

The S.J.C.'s reliance, and interpretation of Section 6, that its equity jurisdiction affords the Probate Court an umbrella over every matter regarding a minor child (and consequently, affords any non-related person standing to assert visitation rights) is in direct contravention of its judicial power of interpreting the law and its restriction on lawmaking, expressly reserved to the Legislative branch.

The Massachusetts judicial branch's power is restricted in the same fashion as the Federal Court in abstaining from judicial legislation. The Federal Court's "equitable" powers, encompassed in the United States Constitution, Article III, §§1,2 extends: "[t]he judicial power of the United States . . . to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treatises made . . . under this authority."

In explaining the limited authority of the federal courts' equitable powers, Alexander Hamilton stated in response to Anti-Federalist resistance, "[t]he courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." The Federalist No. 78, at 526.

Anti-Federalists criticized that the provision regarding the court's equitable power might be read to grant the courts broad equitable powers. Blackstone feared that "equity courts would have undermined the rule of law and produced arbitrary government. [The judiciary's] powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will." *Missouri v. Jenkins*, 515 U.S. 70, 127 (1995) (Thomas, J., concurring), *quoting* 3 W. Blackstone, Commentaries on the Laws of England 436, 440 (1768). The "Federal Farmer" further cautioned "by thus joining the word equity with the word law, if we mean anything, we seem to mean to give the judge a discretionary power" and that equity jurisdiction was not "intended to lodge an arbitrary power or discretion in the judges, to decide as their conscience, their opinions, their caprice, or their politics might dictate." *Missouri* at 128 (Thomas, J., concurring), *citing* Federal Farmer No. 15, Jan. 18, 1788, in 2 The Complete Anti-Federalist 322 (H. Storing ed. 1981).

The "Federal Farmer" also feared that combining equity and law in the same court, "is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate; we have no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion." *Id.* n.4, *citing* Federal Farmer No. 3, Oct. 10, 1787, in 2 Storing 244.

In response to the Anti-Federalists' concerns, Alexander Hamilton described that the federal court's power

would be limited by rules and precedent "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." *Id.* at 129, *citing* the Federalist No. 78, p. 529. Hamilton also emphasized that "[t]he great and primary use of a court of equity is to give relief in extraordinary cases," and "the principles by which that relief is governed are now reduced to a regular system." *Id., citing* the Federalist No. 83, at 569.

Justice Thomas, upon review of the Federalists' explanation of the equity power, declared that "we should exercise the power to impose equitable remedies only sparingly, subject to clear rules guiding its use." *Missouri* at 123 (Thomas, J., concurring).

Similarly, the Probate Court's "equitable" powers should only be used sparingly and in extraordinary cases, and only when the authority for doing so has been granted to them by the Legislature. The Probate Court's equitable powers do not and cannot provide them with such power that, "if the law restrain [them], [they are] only to step into [their] shoes of equity, and give what judgment [their] reason or opinion may dictate." This is the basic principle of the Massachusetts' (and Federal) constitutional scheme. Yet, the S.J.C. did exactly this: they admitted that the Probate Court does not have statutory authority to grant E.O. visitation, so they stepped into their "shoes of equity" and created a de facto doctrine that would allow a non-biologically related person with no legal relationship to a minor child, to assert visitation rights with a minor child based on the court's "equity

jurisdiction" allegedly granted to them through M.G.L. c. 215, §6.

> M.G.L. c. 215, §6 provides, in relevant part:
> The probate and family court shall have original and concurrent jurisdiction . . . of all cases and matters of equity cognizable under the general principles of equity jurisprudence and, with reference thereto, shall be courts of general equity jurisdiction. . . .
> Probate courts shall also have jurisdiction . . . of all cases and matters in which equitable relief is sought relative to: (i) the administration of the estates of deceased persons; (ii) wills . . . ; (iii) trusts created by will or other written instrument; (iv) cases involving in any way the estate of a deceased person . . . ; (v) trusts created by parol or constructive or resulting trusts; (vi) all matters relative to guardianship or conservatorship; and (vii) actions such as one described in clause (11) of section three of chapter two hundred and fourteen [governing actions determining property of church or religious society] and of all other matters of which they now have or may hereafter be given jurisdiction. . . . They shall also have jurisdiction . . . of proceedings in which equitable relief is sought under sections seven to twelve, inclusive of chapter one hundred and seventeen [repealed] and section twenty-six of chapter one hundred and twenty-three [regarding guardian or conservator of mentally-ill person]. (App. 55-57).

Inexplicably, the S.J.C. declared the Probate Court's equity jurisdiction under Section 6 "encompasses the persons and estates of infants" although this language is nowhere in the Statute. (App. 6). Rather, a state court's general authority over "the persons and estates of infants" appears to have originated in this country in *New*

York Insurance Co. v. Bangs, 103 U.S. 435 (1880). This general authority arose in the English courts from its general duty as "parens patri[a]e to protect persons who have no other rightful protector." *Id.* at 438. Yet, the S.J.C.'s reliance on this general authority over "the persons and estates of infants" is significantly misplaced. First, "the persons and estates of infants" involved protecting an infant "to preserve the [infant's] property from destruction or waste," *Id.*, which is not applicable in the present case.

Additionally, and most importantly, the S.J.C. used this general authority as a basis of E.O.'s standing. This offends all notions of jurisdiction. Before the S.J.C. may determine whether it may use its "parens patriae" power over B., it must first find that E.O. had standing before going into the "best interests of the child" examination.[5] Thus, it is immaterial whether there was a "Co-Parenting Agreement" or to what extent E.O. cared for B. Otherwise, a court can always circumvent the law through this analysis, which offends the separation of powers doctrine.

Consistent with the court's limitations of judicial fiat, the Massachusetts Appeals Court refused to grant visitation to a maternal grandparent of an illegitimate minor

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[5] The S.J.C.'s reliance on *Youmans v. Ramos*, 429 Mass. 774, 711 N.E.2d 165 (1999) as support for E.O.'s standing is erroneous. The *Youmans* Court found that the "right (or standing) of [a nonparent] to seek visitation privileges with a minor child is not at issue in this case." *Id.* at 780; 711 N.E.2d at 170. Additionally, the *Youmans* Court already had jurisdiction over the child's welfare for transferring custody of the minor child from a legal guardian back to the child's natural father. *Id.* at 775; 711 N.E.2d at 167.

child, whose paternity was not adjudicated or acknowledged, under its general equity jurisdiction because "matters of equity jurisprudence include 'cases in which the subject matter of the controversy is one recognized by the courts at common law, but in which the remedy at law is not plain, adequate and complete and because there is no common law right to grandparent visitation.' " *Enos v. Correia*, 38 Mass. App. Ct. 318, 323 n.11, 647 N.E.2d 1215, 1218 n.11 (1995).

Indeed, there is no common law right to visitation between a minor child and a non-parent. *See Id.*; 647 N.E.2d at 1218 n.11 (stating no common law right to grandparent visitation but legislature provided specific statutory remedy for certain grandparents). Rather, the court's authority to grant such visitation can only be through legislative action, not through its "equity" jurisdiction or "parens patriae" power. *See* M.G.L. c. 119, §23 (providing grandparent visitation when child is in foster care after finding of parental unfitness); M.G.L. c. 119, §39D (authorizing grandparent visitation if parents of child divorced, separated, deceased or if illegitimate child's paternity adjudicated or acknowledged); M.G.L. c. 208, §28 (providing custody or visitation to child's parents or to third person upon divorce judgment); M.G.L. c. 209C, §5 (allowing mother, person presumed or alleging himself father, child, child's guardian, next of kin or other person standing in parental relation to child to commence complaint to establish, inter alia, visitation or custody of child); M.G.L. c. 209C, §10 (granting court authority to award custody of illegitimate child after adjudication or acknowledgment to mother, father or another suitable person with written consent of parents or surviving parent or parental unfitness). Thus, the court's authority to

grant third-parties, such as grandparents, visitation with a minor child was only through legislative action.

It logically follows that because there is no common law right to visitation between a child and a non-biological person, the Probate Court does not have the authority through their "equity" jurisdiction to grant such visitation without legislative action. If this was not the case, it begs the question why did the Legislature enact such laws.

"Equity" developed into a distinct legal system that included specific recognized categories of cases. *Missouri*, 515 U.S. at 127 (Thomas, J., concurring). These cases included special property forms (trusts) or those for which common law did not provide relief (fraud, forgery or mistake). *Id.* The present case does not involve any of these categories of cases. Rather, this case concerns visitation with a minor child, which the Massachusetts Legislature has already acted upon through their comprehensive statutory scheme regarding visitation with a minor child. The court's duty is to interpret the law enacted by the Legislature, representing the will of the people. Because there is no specific law for the court to interpret, the inquiry should have ended there. Absent such legislative action, "courts must presume the Legislature is acting, or refusing to act, by virtue of its position as representatives of the will of the people." *West v. Superior Court of Sacramento*, 59 Cal. App. 4th 302, 309, 69 Cal. Rptr. 2d 160, 164 (1997).

Moreover, the Probate Court's equity jurisdiction does not and cannot rise to the level of judicial lawmaking by granting visitation to a non-biological and unrelated person without violating the Massachusetts Declaration of Rights. *See also Van v. Zahorik*, 597 N.W.2d

15 (1999) (refusing to apply equitable parent doctrine as issue is policy-based and should be legislatively enacted); *See V.C. v. M.J.B.*, 319 N.J.Super 103, 725 A.2d 13 (1999) (Braithwaite, J.A.D., Dissenting) ("evaluating changes in social mores and how those changes are to impact our social policy as reflected in our statutes, is more properly addressed by the Legislature as opposed to the courts"); *West v. Superior Court of Sacramento*, 59 Cal. App. 4th 302, 69 Cal. Rptr. 2d 160 (1997) (holding court lacked jurisdiction over petition for visitation rights by non-related person to child as de facto parent doctrine is for legislative action); *Liston v. Pyles*, 1997 WL 467327 (Ohio 1997) (finding non-related person to child had no statutory right to visitation with minor child, determination left to legislature); *Music v. Rachford*, 654 So.2d 1234 (Fla. Dist. Ct. 1995) (failing to recognize de facto parent doctrine as visitation rights to non-parent are statutory and court has no inherent authority to award visitation); *Lihs v. Lihs*, 504 N.W.2d 890 (Iowa 1993) (ruling despite it was in child's best interests, court had no common law or statutory authority to mandate visitation with third parties); *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27 (1991) (declaring neither non-biological nor adoptive person lacks standing to seek visitation with child, properly in custody of biological mother); *Cooper v. Merkel*, 470 N.W.2d 253 (S. Dakota 1991) (dismissing petition for visitation with minor child of woman with whom he had cohabited). *But See V.C. v. M.J.B.*, 319 N.J.Super 103, 725 A.2d 13 (1999) (applying psychological parent principle in allowing same-sex partner visitation rights); *J.A.L. v. E.P.H.*, 452 Pa. Super. 78 (1996) (allowing non-biological person visitation under loco parentis doctrine); *Holtzman v. Knott*, 193 Wis. 2d 649, *cert. denied*, 516 U.S. 975 (1995)

(granting visitation to non-biological person with evidence of parent-like relationship and significant event justifying State intervention); *A.C. v. C.B.*, 113 N.M. 581 (1992) (standing based on deprivation of right to maintain continuing relationship with child).

The S.J.C. has also declined numerous times to invade the legislature's lawmaking authority by refusing to allow a non-biological person of a minor child to obtain visitation rights with the child. *See C.M. v. P.R.*, 420 Mass. at 223, 649 N.E.2d at 155 (refusing to allow putative father from asserting visitation under the court's "equitable parent" doctrine because there is "little authority that supports a claim of a right to visitation or custody"); *Freeman v. Chaplic*, 388 Mass. 398, 406, 446 N.E.2d 1369, 1374-75 (1983) (abstaining from applying general equitable powers of Probate Court to circumvent mandates of statutes and holding statutes do not allow court award custody to another guardian absent evidence of unfitness of child's guardian); *Enos v. Correia*, 38 Mass. App. Ct. at 323 n.11, 647 N.E.2d at 1218 n.11 (dismissing Probate Court's "equitable powers" because no common law right to grandparent visitation and Legislature provided specific statutory remedy, thereby precluding maternal grandmother from seeking visitation without adjudication of paternity or father's acknowledgment).

Nor can the Legislature, through its enactment of M.G.L. c. 215, §6, cloak the Probate Court with such authority to grant a non-biological parent visitation. In describing Congress' power to delegate authority, the Supreme Court of the United States (Kennedy, J.) explained "[t]he true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring

authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Loving v. United States*, 517 U.S. 748, 758 (1996), *quoting Field v. Clark*, 143 U.S. 649, 693-94 (1892). Similarly, the Massachusetts legislature could not have delegated to the Probate Court the authority to make law regarding visitation with a minor child. It was specifically because of the judiciary's restraint from doing so that numerous laws regarding visitation have been enacted by the legislature.

In maintaining judicial restraint, the Supreme Court of the United States declared a California Statute constitutional where the statute created a presumption that a child born to a married woman living with her husband is a child of the marriage, thereby precluding the father of the child to maintain any filial relationships with his child. *Michael H. v. Gerald D.*, 491 U.S. 110 (1988). Affirming the lower court, the Supreme Court stated "[i]t is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted." *Id.* at 130.

The Probate Court is similarly restrained from granting any custodial orders to E.O. until the people of Massachusetts endorse such rights through express legislative action.

Numerous jurisdictions have enacted laws allowing a non-biological person, such as E.O., standing for visitation or custody with a minor child. *See generally Enos v. Correia*, 38 Mass. App. Ct. 318, 647 N.E.2d 1215 (1995); John Dewitt Gregory, Note, *Blood Ties: A Rationale for Child Visitation by Legal Standards*, 55 Wash. & Lee L. Rev. 351 (1998), for examples of legislation granting visitation

to non-biological and non-related persons. In contrast to these jurisdictions, Massachusetts has not enacted such laws, thereby precluding the Probate Court from granting E.O. standing. As the S.J.C. declared, "this court is under a duty to avoid judicial legislation in the guise of new constructions to meet real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative of adjusting the statutes to changed conditions." *Pielech v. Massasoit Greyhound, Inc.*, 423 Mass. 534, 539, 668 N.E.2d 1298, 1302 (1996), *quoting Commonwealth v. Isenstadt*, 318 Mass. 543, 548, 62 N.E.2d 840, 843 (1945). Yet, in the present case, the S.J.C. improperly circumvented their limitation on judicial legislation under the guise of their "equity" power as parens patriae.

Whether it is in B.'s best interests to have visitation with E.O. is immaterial (as is the fact that the parties entered into a "Co-Parenting Agreement")[6] as this determination can only be examined *after* E.O. has standing, which the Legislature clearly has not contemplated. Indeed, there are countless instances where it would be in a child's best interests to have visitation with a teacher, au pair, daycare provider, etc., who have spent more time caring for a child than the child's parents and may have a significant relationship with a child.

The Massachusetts Legislature has enacted statutes regarding visitation of a minor child where it has deemed it appropriate, and in response to the people's will. It

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[6] The Probate Court would first have to have jurisdiction over the child's custody; and even then, such a contract is not binding or enforceable "concerning children . . . that do not conform to the child's best interests." *Wilcox v. Trautz*, 427 Mass. 326, 334 n.7, 643 N.E.2d 141, 147 n.7 (1998).

gave certain people standing and gave the courts authority to determine whether an award of visitation would be in the child's best interests. Establishing visitation rights with a third party with no legal relationship to the child establishes a right with serious social implications that must be addressed only by the Massachusetts Legislature.

B. Violating the Separation of Powers Doctrine Compels this Court to Reverse the Massachusetts Court's Ruling.

In the case before this Court, the S.J.C. clearly and severely invaded into the Legislature's province by bestowing rights to a person who has no legal relationship to a minor child. As discussed, *supra*, this Court has "reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches." *Metropolitan Washington Airports Authority*, 501 U.S. at 272. As the S.J.C. properly noted: "the concept of a separation of powers is fundamental to our form of government . . . it is implicit in the structure of the government." *Opinion of the Justices*, 365 Mass. at 640, 309 N.E.2d at 478. Such policy-making by the S.J.C. is exactly what the Anti-Federalists feared in granting the Federal Court's power in equity.

As one-third of the S.J.C. strenuously announced in its dissent in the present case, the Court's decision is an example of judicial lawmaking, greatly expanding the court's equity jurisdiction and, consequently, allows a Probate Court Judge to "drop into a family relation without any particular legal warrant and decree that a parent must follow a particular course in the upbringing of that child, when that course is not otherwise prescribed by law or its contrary forbidden by law." (App. 19).

Additionally, as Alexander Hamilton explained, "[i]t equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that there is no liberty, if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78.

Neither the Massachusetts Declaration of Rights nor the Constitution of the United States was created to grant to a court, (in this case, four justices), the authority to declare the will of its people. "A state court functions at its lowest ebb of legitimacy when it not only ignores constitutional mandates, but also legislates from the bench, usurping power from the appropriate legislative body and forcing moral views of a small, relatively unaccountable group of judges upon all those living in the state." *Holtzman v. Knott*, 193 Wis.2d 649, 711, 533 N.W.2d 419, 442 (1995) (Steinmetz, J., dissenting).

Presently, Massachusetts has two areas of family law, allowing one who seeks visitation to choose the area that best suits them. The first area of family law is declared by the legislature, representing the will of the people of Massachusetts while the second area is declared by the four justices of the S.J.C., representing their own social values. *Id.* at 729, 533 N.W.2d at 450.

As final arbitrator of decisions by courts of last resort, this Court provides the only mechanism to maintain the checks and balances so crucial in our form of government. Without this Court's reversal of the S.J.C.'s ruling, any such person in Massachusetts has standing to assert their right to visitation with a minor child.

II. THE MASSACHUSETTS SUPREME JUDICIAL COURT VIOLATED THE PETITIONER'S FUNDAMENTAL RIGHT TO REAR HER BIOLOGICAL CHILD WITHOUT STATE INTERFERENCE BY GRANTING, WITHOUT THE PETITIONER'S CONSENT, VISITATION BETWEEN THE PETITIONER'S MINOR CHILD AND THE RESPONDENT.

This Court has repeatedly affirmed that the Due Process Clause of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, "affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Michael H.*, 491 U.S. at 122, *quoting Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), and that "[o]ur cases reflect 'continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society . . . ' " *Id.* at 122-23, *quoting Griswold v. Connecticut*, 381 U.S. 479, 501 (1965).

One of the basic and long-standing constitutional rights is the fundamental liberty interest of a parent to conceive and raise one's child without State interference, which have been deemed "essential," "basic civil rights," and "far more precious . . . than property rights." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 393 (1923). *See Moore v. City of East Cleveland*, 431 U.S. 494, 503 n.12 (1977), *citing Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("holding in part on the constitutional right of parents to assume the primary role in decisions concerning the rearing of their children . . . and because the parental role 'is now established beyond debate as an enduring American tradition' ").

While this Court has held that the state, under the parens patriae doctrine, has a duty to protect a child's well-being, *Wisconsin*, 406 U.S. at 220; *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944), parental rights (and individual liberties) are only trumped by the "best interests of the child" principle when there exists physical or emotional harm to a child. *Wisconsin, supra,* at 230; *Prince, supra,* at 166-67. Specifically, the *Wisconsin* Court stated that "if a parent's childraising method does not 'jeopardize the health or safety of the child, or have a potential for significant social burdens' the state shall not interfere." *Holtzman, supra,* at 707, *quoting Wisconsin, supra,* at 234.

In the present case, there is no evidence that L.M. is jeopardizing the health or safety of B. warranting an intrusion into L.M.'s fundamental right to raise her child without state interference by ordering visitation between B. and E.O.

Only sixteen years ago, the Massachusetts Supreme Judicial Court refused to grant guardianship to the maternal stepgrandparents of a child, where the paternal grandparents had previously been granted legal custody (as guardians). *Freeman v. Chaplic*, 388 Mass. 398, 446 N.E.2d 1369 (1983). The court found that the primary grant of custody/guardianship to the paternal grandparents was based upon the biological parents' wishes, and there was no finding of unfitness. *Id.* at 409, 446 N.E.2d at 1376. The court enunciated:

> [w]hile the State here is not seeking custody of the child for itself, its intervention against the wishes of the parents must serve some substantial interest of the State . . . As a general matter, granting custody to a parent opposed by the

> parents where neither the parents nor the parents' nominee is unfit or unsuitable, would not measurably advance any interest of the State and would raise serious constitutional difficulties. *Id.* at 407, 446 N.E.2d at 1375.

Similar to this Court's narrowing of the issue in *Michael H.*, 491 U.S. at 127, L.M. must simply establish that our society has traditionally afforded a biological parent the right to raise her child without state interference, where there is no allegation of jeopardizing the health or safety of B. Our cases have consistently held that she has such a right, thereby affording protection against Massachusetts' improper intrusion on raising B.

This is not an issue of a "family's" or "parents' " fundamental rights, which would have to be defined broadly to include two partners (with no legal relationship) and a minor child. Family implies biological relationships, between a parent and child. *Smith v. Organization of Foster Families for Equity and Reform*, 431 U.S. 816, 843 (1977). Although a biological relationship is not an exclusive determination of the existence of a family, this Court has defined family to include a child's aunt and guardian, *Prince*, 321 U.S. at 159; foster parents, *Smith*, 481 U.S. at 845-56; unlegitimized marriage, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); and, grandsons and other relatives, *Moore*, 431 U.S. at 504-06.

This Court, however, has not included partners in the definition of family nor has it defined parents to include a non-related person with no legal relationship to a child.[7] Thus, E.O. has no fundamental right. To judicially

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[7] The *Michael H.* Court refused to find that a father of an illegitimate child had a fundamental right which would qualify

establish such a right would be contrary to "[o]ur cases reflect[ing] 'continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society . . . ' " *Michael H.*, 491 U.S. at 123, *quoting Griswold*, 381 U.S. at 501.

Additionally, even if E.O. has some constitutional right, albeit, a right not found by this Court, a "balancing" test has already been made by Massachusetts and its Legislature. To provide E.O. protection is to deny L.M. protection, which this Court has historically provided to such a biological parent.

III. THE PROBATE COURT VIOLATED THE PETITIONER'S DUE PROCESS RIGHTS BY PREVENTING THE PETITIONER THE RIGHT TO CONDUCT AN EVIDENTIARY HEARING AND THE OPPORTUNITY TO CROSS-EXAMINE THE GUARDIAN AD LITEM BEFORE THE COURT GRANTED VISITATION BETWEEN THE PETITIONER'S BIOLOGICAL CHILD AND THE RESPONDENT.

Assuming, *arguendo*, that E.O. had standing to assert visitation rights with B., the Probate Court violated L.M.'s Due Process Rights by preventing L.M. from conducting an evidentiary hearing and allowing her the right to cross-examine the guardian ad litem before the Probate Court issued the visitation orders.[8]

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as a liberty interest because of state law precluding him any parental rights and because "[w]e are not aware of a single case" that affords the father such a right. *Michael H., supra*, at 127.

[8] It should be noted that many of the "facts" relied upon by the S.J.C. were merely unproven allegations, which L.M. contests. However, due to the fact that there was no cross-

As discussed *supra*, L.M. has a protected interest in raising B. without State interference. Yet, "before a person is deprived of a protected interest, [s]he must be afforded opportunity for some kind of hearing . . . " *Smith*, 431 U.S. at 848, *quoting Board of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972). As also discussed *supra*, Massachusetts does not allow third-parties immediate visitation on a temporary basis without a significant evidentiary burden showing parental unfitness.

Unquestionably, before a court can enter any custodial order between parties with proper standing, the court must determine what is in the best interests of a child on the basis of evidence presented by the parties and, in some cases, a guardian ad litem. In the present case, L.M.'s Due Process rights were violated as she was precluded from examining the guardian ad litem (whose report was reviewed by the court) in fashioning the visitation order, as well as prevented from presenting the court with evidence on the issue of whether it was in B.'s best interests to have visitation with E.O. *See Gilmore v. Gilmore*, 369 Mass. 598, 604-05, 341 N.E.2d 655, 659 (1976) (remanding for new hearing on issue of custody due to court's failure to allow parties to examine guardian ad litem, whose report was relied on by court).

The Probate Court also denied L.M. the opportunity to present evidence to the court, including testimony by her family members and B.'s counselor. This is especially alarming where L.M. has made allegations that E.O. posed a threat of harm to B. Additionally, the guardian ad litem acknowledged that the report was incomplete and

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examination of witnesses or any evidentiary hearing, these allegations remain unchallenged, and their veracity assumed.

also was concerned that "[the guardian ad litem] had no way of knowing how stable B. is at this time, how he understands [E.O's] absence, or what his attachment to [E.O.] is." Moreover, neither the court nor the guardian ad litem have had the opportunity to discuss this matter with B.'s counselor.

Yet, despite the incomplete report, failure to hear testimony and conduct an evidentiary hearing, the court ordered temporary visitation to E.O., who was alleged to have posed a threat of harm to B. Consequently, L.M. was deprived of her protected interest of raising B. without State interference.

IV. THIS CASE IS OF NATIONAL SIGNIFICANCE TO RESOLVE INCONSISTENT DECISIONS AMONG LOWER COURTS AND IMMEDIATE IMPORTANCE TO THE PUBLIC.

No doctrine is more fundamental and important to this country than the Separation of Powers doctrine. No liberties are more precious than the right to raise one's child without State interference. The constitutional protections affording this principle as well as individual liberties, however, have come under enormous pressure as lower courts continue to struggle with what rights are to be afforded to non-traditional "families" and their children in the absence of legislation, particularly since it is becoming more common for such non-traditional "families" to raise children.

While this Court has at times acted under the belief that domestic relations issues are matters better reserved to the States, it is clear that lower courts' decisions will only continue to be inconsistent when confronted with

cases specifically at issue as in the present case.[9] Without this Court's guidance, these identical issues will continue to implicate both the separation of powers doctrine (in the absence of legislative action) and the freedom of biological parents to raise their children.

In light of this ever increasing trend, the Supreme Court of the United States should take this opportunity to instruct courts to restrain from judicial legislation in the absence of legislative action and continue to protect a biological parent's fundamental right to raise his or her child without the State impermissibly intruding. It is crucial that this Court, as final arbitrator, not allow courts

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[9] Courts throughout this country are divided with whether they should grant visitation with a minor child to a person in a same-sex relationship, who is neither the biological parent nor has a legal relationship to the minor child. *See West v. Superior Court of Sacramento*, 59 Cal. App. 4th 302, 69 Cal. Rptr. 2d 160 (1997) (holding court lacked jurisdiction over petition for visitation rights by non-related person of lesbian relationship); *Liston v. Pyles*, 1997 WL 467327 (Ohio 1997) (finding non-related person to child from same-sex relationship had no statutory right to visitation with minor child); *Music v. Rachford*, 654 So.2d 1234 (Fla. Dist. Ct. 1995) (failing to recognize de facto parent doctrine as authority to grant visitation rights to non-person in former lesbian relationship); *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27 (1991) (declaring neither non-biological nor adoptive person lacks standing to seek visitation with child, properly in custody of biological mother). *But See V.C. v. M.J.B.*, 319 N.J.Super. 103, 725 A.2d 13 (1999) (applying psychological parent principle to same-sex partner in allowing visitation); *J.A.L. v. E.P.H.*, 452 Pa. Super. 78 (1996) (allowing non-biological person in same-sex relationship visitation under loco parentis doctrine); *Holtzman v. Knott*, 193 Wis. 2d 649, *cert. denied*, 516 U.S. 975 (1995) (granting visitation to non-biological person in lesbian relationship); *A.C. v. C.B.*, 113 N.M. 581 (1992) (standing of person in same-sex relationship based on deprivation of right to maintain continuing relationship with non-biological child).

to allow legal strangers to seek custodial rights of another's minor children without specific legislation simply because the court determines it is in the child's best interests rather than adhere to the Constitution of the United States.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 27, 1999

App. 1

429 Mass. 824

E.N.O.

v.

L.M.M.

Supreme Judicial Court of Massachusetts, Suffolk.

Argued March 4, 1999.
Decided June 29, 1999.

Elaine M. Epstein & Gary Owen Todd, Boston (Rosemarie Haigazian, Edgartown, with them) for the defendant.

E. Oliver Fowlkes, Boston, & Mary L. Bonauto, Portland, ME (Honora Kaplan, Boston, with them) for the plaintiff.

Bettina Borders, New Bedford (Dana Alan Curhan, Boston, with her) for the child.

Gretchen Van Ness, Boston, & Pauline Quirion, Cambridge, for Greater Boston Legal Services & others, amici curiae, submitted a brief.

Present: WILKINS, C.J., ABRAMS, LYNCH, FRIED, MARSHALL, & IRELAND, JJ.

ABRAMS, J.

A single justice of the Appeals Court allowed the defendant's, L.M.M.'s, petition pursuant to G.L. c. 231, § 118, to vacate a temporary visitation order issued by the Probate Court, reasoning that *C.M. v. P.R.*, 420 Mass. 220, 649 N.E.2d 154 (1995), controlled. The plaintiff, E.N.O., petitioned a single justice of this court, pursuant to G.L. c.

211, § 3, to reinstate visitation pending a trial on the merits. Distinguishing *C.M.*, the single justice allowed the request. The defendant then filed this appeal. We affirm.

The issue, one of first impression, is whether the facts warrant the Probate Court's exercise of jurisdiction to grant visitation between a child and the child's "de facto" parent.[1] Because visitation was in the best interests of the child, we hold that the single justice did not abuse his discretion in reinstating visitation.

The facts are as follows. The parties are two women who shared a committed, monogamous relationship for thirteen years. During their relationship, they availed themselves of every legal mechanism for signifying themselves life partners. From the beginning of their relationship, the plaintiff and the defendant planned to become parents. In 1991, they elected to do so biologically, deciding that the defendant should try to become pregnant through artificial insemination. Before the insemination process began, the defendant and the plaintiff both attended workshops to learn about artificial insemination and parenting issues. The plaintiff attended all the insemination sessions and participated in all medical decisions.

In 1994, while the couple was living in Maryland, the defendant became pregnant. Throughout the defendant's

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[1] The defendant asks us also to address whether the plaintiff may seek adoption or custody of the child and whether a coparenting agreement executed by the parties is specifically enforceable. The only issue before the single justice was the propriety of the temporary visitation order. The plaintiff's custody, adoption and financial claims are still pending in the Probate Court. We do not reach these issues.

complicated pregnancy, the plaintiff cared for her. The plaintiff also accompanied the defendant on every visit with her doctors. When the child was born in February, 1995, the plaintiff acted as the defendant's birthing coach and cut the child's umbilical cord. The plaintiff stayed overnight at the hospital. Hospital staff treated her as a mother, giving her a bracelet denoting her a parent of "Baby O.M." The parties sent out birth announcements naming them both as parents. The child's last name consists of the parties' last names.

Before the child was born, and again afterward, the parties executed a coparenting agreement in which they expressly stated their intent to coparent a child. The agreement also expressed the parties' intent that the plaintiff retain her parental status even if the defendant and the plaintiff were to separate. The defendant executed documents authorizing the plaintiff to care for the child as a parent.[2]

After the child was born, the plaintiff assumed most of the financial responsibility for the family. Later, for a period of approximately seven months, the plaintiff also assumed primary care for the child because the defendant was experiencing medical problems. The child calls the plaintiff "Mommy" and the defendant "Mama." He tells people that he has two mothers.

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[2] These documents included "Medical and Health Care Authorization," "Designation [of the plaintiff as] Standby Guardian," and "Nomination of Guardian of the Person and Property of my Child."

In September, 1997, the parties moved to Massachusetts. In April, 1998, the plaintiff called an attorney about proceeding with joint adoption of the child. Thereafter the parties' relationship began to deteriorate. The couple separated in May, 1998. The defendant then denied the plaintiff any access to the child.

In June, 1998, the plaintiff filed a complaint seeking specific performance of the parties' agreement to allow the plaintiff to adopt the child and assume joint custody. She also sought visitation with the child as well as a winding down of her financial affairs with the defendant. The defendant's motion to dismiss the action was denied.

After a hearing, a Probate Court judge ordered temporary visitation, pending trial, between the plaintiff and the child. The judge applied the "best interests of the child" standard, noting that "children born to parents who are not married to each other are to be treated in the same manner as all other children." See G.L. c. 209C, § 1. The judge viewed several facts as significant. He found that the decision to have the child was made jointly by the plaintiff and the defendant. After the child's birth, the plaintiff had daily contact with the child and "acted in the capacity [of] his other parent in all aspects of his life." The judge further observed that the plaintiff and the defendant "at all times referred to each other as [the child's] parents." In addition, the judge stated, without further description, that the plaintiff was "listed on all contracts and applications as [the child's] parent."

The judge also relied on the report of the guardian ad litem (GAL). The judge specifically cited the GAL's

finding that the plaintiff was an active parent and appreciative of the child's needs. The GAL stated that "both mothers were clearly involved in [the child's] upbringing." From all these facts, the judge concluded that temporary visitation was in the child's best interests.

1. *Standard of review.* General Laws c. 211, § 3, confers on this court the power of "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided." "We shall reverse a decision of a single justice only when there is clear error of law or an abuse of discretion." *Department of Mental Retardation v. Kendrew,* 418 Mass. 50, 53, 634 N.E.2d 109 (1994). We conclude that the single justice was correct in his determination that, on these facts, the Probate Court judge properly exercised his jurisdiction.

2. *Discussion.* The heart of the defendant's argument is that the Probate Court lacked jurisdiction to order temporary visitation. The defendant looks first for statutory authority and finds no statute expressly permitting the order of visitation privileges to one who stands in a parent-like position. However, the Legislature has conferred equity jurisdiction on the Probate Court, and that is the source of the Probate Court's authority in this matter.[3] General Laws c. 215, § 6, provides: "The probate

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[3] The defendant is correct that other statutes conferring jurisdiction do not provide the Probate Court with authority in this matter. For example, when a child's married parents separate or divorce, G.L. c. 208, §§ 19 and 28, authorize the Probate Court to make orders regarding visitation while the divorce is pending and after it becomes final. Here, the child's

and family court department shall have original and concurrent jurisdiction with the supreme judicial court and the superior court department of all cases and matters of equity cognizable under the general principles of equity jurisprudence and, with reference thereto, shall be courts of general equity jurisdiction. . . . "

The Probate Court's equity jurisdiction is broad, extending to the right to authorize visitation with a child. This is because the Probate Court's equity jurisdiction encompasses "the persons and estates of infants." See *Gardner v. Rothman*, 370 Mass. 79, 80, 345 N.E.2d 370 (1976) (Probate Court has jurisdiction over claim of father of illegitimate child to visitation because the court's equity jurisdiction "extends to the persons and estates of infants, and is not restricted to legitimate children"). The court's duty as parens patriae necessitates that its equitable powers extend to protecting the best interests of children in actions before the court, even if the Legislature has not determined what the best interests require in a particular situation.[4] "In every case in which a court

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parents, the plaintiff and the defendant, were not married nor could they be under Massachusetts law. Similarly, statutes governing paternity do not confer jurisdiction over actions like that before us. General Laws c. 209C, §§ 5 and 10, require an adjudication of paternity before the Probate Court is authorized to award visitation. The Legislature has authorized the Probate Court to grant visitation rights to grandparents of unmarried minor children, G.L. c. 119, § 39D, but there is no parallel provision authorizing similar measures in actions pressed by parents in the plaintiff's position.

[4] We note that G.L. c. 119, § 39D, granting visitation rights to grandparents, does not limit the scope of equity jurisdiction of the Probate Court. It does not preclude in all other

order has the effect of disrupting a relationship between a child and a parent, the question surely will arise whether it is in the *child's* best interest to maintain contact with that adult." *Youmans v. Ramos*, 429 Mass. 774, 783, 711 N.E.2d 165 (1999).[5] See *Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption*, 392 Mass. 696, 702, 703, 467 N.E.2d 861 (1984) (postadoption visitation by child's mother was properly evaluated by examining child's best interests); *Koelle v. Zwiren*, 284 Ill.App.3d 778, 784, 220 Ill.Dec. 51, 672 N.E.2d 868 (1996) (best interests test controls claim of visitation by biological stranger to child); *Zack v. Fiebert*, 235 N.J.Super. 424, 432, 563 A.2d 58 (1989) (same); *Roberts v. Ward*, 126 N.H. 388, 392, 493 A.2d

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circumstances an order of visitation between a child and one who is not a legal parent. See *Youmans v. Ramos, ante* 774, 783 n. 18, 711 N.E.2d 165 (1999).

[5] The dissent attempts to distinguish this case from *Youmans* by claiming that the defendant and the child were never subject to the Probate Court's jurisdiction in some other proceeding or for some other reason. The dissent ignores the fact that the plaintiff seeks to adopt the child and share legal custody because, in the dissent's view, these claims are baseless. Even without these additional claims, however, it is our opinion that the broad jurisdiction of the Probate Court gives it authority in this matter.

The dissent also implies that, unlike the plaintiff here, the aunt in *Youmans* was a de facto parent because she was a legally adjudicated guardian. However, the aunt was appointed temporary guardian only eleven days before the father moved for custody. We concluded that the aunt was a de facto parent not because she held temporary guardianship, but because she attended to the child's developmental, medical, and educational needs for the five years from the child's infancy to her appointment as temporary guardian. See *Youmans, supra* at 776, 711 N.E.2d 165.

478 (1985) (court may use its parens patriae power to decide whether welfare of child warrants court-ordered visitation with grandparents). But see *Enos v. Correia*, 38 Mass.App.Ct. 318, 323 n. 11, 647 N.E.2d 1215 (1995) (limiting Probate Court's equity jurisprudence to cases in which the subject matter of the controversy is one recognized by the courts at common law). A judge, therefore, should evaluate a child's best interests in light of the specific circumstances.

We acknowledge that the "best interests" standard is somewhat amorphous. We must ask what facts the judge may take into account in determining where a child's best interests lie. Here, the judge emphasized the plaintiff's role as a parent of the child. It is our opinion that he was correct to consider the child's nontraditional family.

A child may be a member of a nontraditional family in which he is parented by a legal parent and a de facto parent. A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. See *Youmans, supra* at 776 & n. 3, 711 N.E.2d 165 (1999); ALI Principles of the Law of Family Dissolution § 2.03(1)(b) (Tent. Draft No. 3 Part I 1998) (adopted at annual meeting May, 1998). The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care,

and serves as a moral guide.[6] See ALI Principles of the Law of Family Dissolution, *supra* at § 2.03(6).

The recognition of de facto parents is in accord with notions of the modern family. An increasing number of same gender couples, like the plaintiff and the defendant, are deciding to have children. It is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto. See *Adoption of Tammy*, 416 Mass. 205, 207, 619 N.E.2d 315 (1993). See also J. Goldstein, The Best Interests of the Child 12-13 (1996). Thus, the best interests calculus must include an examination of the child's relationship with both his legal and de facto parent.

In assessing a child's relationship with his de facto parent, a judge may consider the factors we have set forth previously. For example, in *C.C. v. A.B.*, 406 Mass. 679, 550 N.E.2d 365 (1990), we held that a man could maintain a paternity action under G.L. c. 215, § 6, even though the mother of the child was, at the time of conception and birth, married to another man. *Id.* at 680, 550 N.E.2d 365. We reasoned that the man demonstrated a substantial parent-child relationship. *Id.* at 689, 550 N.E.2d 365. He

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[6] The de facto parent fulfils this role "for reasons primarily other than financial compensation." See ALI Principles of the Law of Family Dissolution § 2.03(1)(b) (Tent. Draft No. 3 Part I 1998) (adopted at annual meeting May, 1998). Thus, we do not recognize as a de facto parent a babysitter or other paid caretaker. Even though these caretakers may grow to feel genuine affection for their charges, their caretaking arrangements arose for financial reasons. See *id.* at comment (b)(ii), at 42.

was listed on the child's birth certificate and baptismal record. The child bore the plaintiff's last name. The mother admitted that the plaintiff might be the father of the child. After the child was born, the plaintiff, the mother, and the child lived together as a family. Finally, the plaintiff demonstrated his interest in continuing his relationship with the child. *Id.*

We reached the opposite result in *C.M. v. P.R.*, 420 Mass. 220, 649 N.E.2d 154 (1995). In that case, a man who was not the biological father of a child sought an adjudication of paternity, as well as incidental visitation rights, under the equitable parent doctrine.[7] *Id.* at 220, 223, 649 N.E.2d 154. We held that the plaintiff did not assert a ground on which relief could be granted because "[h]is devotion to the child does not, without more, permit an adjudication of paternity or visitation privileges." *Id.* at 223, 649 N.E.2d 154. Although the plaintiff had been living with the mother for several months prior to the birth of the child, he had not been part of the decision to create a family by bringing the child into the world. *Id.* at 220-221, 649 N.E.2d 154. Unlike C.M., the plaintiff before us was intimately involved in the decision to bring the child into the world. C.M. also sought an adjudication of legal paternity, not visitation rights as a de facto parent. We did not address the de facto parent doctrine in *C.M.*

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[7] The equitable parent doctrine provides that the husband of the biological mother of a child born or conceived during marriage, who is not the biological father of a child, may be treated as the father if a parental relationship is acknowledged by the father and child or is developed in cooperation with the mother. See *C.M. v. P.R.*, 420 Mass. 220, 223-24, 649 N.E.2d 154 (1995).

We conclude that the single justice did not err or abuse his discretion in reinstating the order of temporary visitation. The Probate Court judge determined that visitation between the plaintiff and the child would be in the child's best interests, and that finding is amply supported. The plaintiff is the child's de facto parent.[8] The plaintiff has participated in the child's life as a member of the child's family. They attended workshops and doctor's visits together. The plaintiff participated in the birth as a father would. The plaintiff was listed on the birth announcements, and the child's last name consists partly of the plaintiff's last name. Here, for example, the plaintiff and the defendant decided to have a child and to form a family. The plaintiff and the defendant manifested their level of commitment to each other, to the child, and to their new family by executing and reexecuting the coparenting agreement.[9] In the coparenting agreement, the parties revealed their beliefs regarding the child's best interests, stating their wish that the child continue his relationship with the plaintiff in the event that the parties' relationship ended. See *Wilcox v. Trautz*, 427 Mass. 326, 334 n. 7, 693 N.E.2d 141 (1998) (cohabitating couple can contract regarding the rights of their children so long

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[8] The parties acknowledged that the plaintiff is the child's de facto parent in the coparenting agreement they executed after the child's birth.

[9] The defendant contends that the existence of the coparenting agreement is inapposite because it is not enforceable under Maryland or Massachusetts law. The agreement is enforceable at least with respect to property, financial and other matters relevant to the parties' relationship, but not as to the child's best interests. See *Wilcox v. Trautz*, 427 Mass. 326, 334 & n. 7, 693 N.E.2d 141 (1998).

as the judge determines that the terms reflect the child's best interests). After the child's birth, the plaintiff resided with the child and the defendant as a family. With the defendant's consent, the plaintiff participated in raising the child, acting in all respects as a de facto parent. The GAL found that the plaintiff was an active parent, responsive to the child's needs. The plaintiff also supported the family financially, and, while the defendant was ill, assumed primary care for the child. The defendant encouraged the plaintiff's parental role, representing the plaintiff as the child's parent in her public dealings and expressing her desire that the plaintiff care for the child as a parent.[10] The defendant authorized the

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[10] The dissent misperceives our reasoning as relying on rights arising from the agreement. Our focus is the best interests of the child, which encompass the child's relationship with a de facto parent. We view the agreement as indicative of the defendant's consent to and encouragement of the plaintiff's de facto parental relationship with the child. The agreement also confirmed that the plaintiff did not assume caretaking responsibilities in exchange for financial remuneration. And, finally, the agreement revealed the parties' belief as the child's best interests. The judge therefore could consider the agreement to determine visitation, as well as to resolve the financial and property issues.

The dissent further argues, relying on the ALI draft, that the fact that the plaintiff did not adopt the child is " 'some evidence' that [the plaintiff's] relationship with the child does not rise to the level of de facto parenthood." *Post* at. In fact, the ALI draft states that failure to adopt is "some evidence, although not dispositive, that the legal parent did not consent to the formation of the de facto parent relationship." See ALI Principles of the Law of Family Dissolution, *supra* at § 2.03 comment (b), at 41. The agreements executed by the defendant tend to establish her consent to the plaintiff's de facto parental role.

plaintiff to make medical decisions for the child and designated the plaintiff as the child's guardian in the event of the defendant's death or incapacitation. The child's attachment to the plaintiff as a de facto parent is evidenced by his calling her "Mommy" and telling people he has two mothers. Thus, on these facts, the best interests of the child require that the plaintiff, as the child's de facto parent, be allowed temporary visitation with the child.[11]

The dissent infers from our attention to the coparenting agreement a conclusion that such agreements, when executed by same-sex couples, "stand[] on a special footing." *Post* at. According to the dissent, our decision "is a clear step in granting legal force to [same-sex] unions." *Post* at. We do not agree. The coparenting agreement stands on the same footing as the agreement in *Wilcox, supra*, where we held that a cohabitating couple could enter into a contract regarding financial, property, and other matters relevant to their relationship. See *id.* at 344, 693 N.E.2d 141. Here, unlike *Wilcox*, a child is involved. For the terms of the agreement dealing with the child, the child's best interests is the critical issue. See *id.* at 334 N. 7, 693 N.E.2d 141. The judge was therefore correct to apply the best interests of the child standard. By treating same-sex couples differently, it is the dissent that is trying to put the contract on special footing.

[11] This result is in accord with other jurisdictions. See, e.g., *J.A.L. v. E.P.H.*, 453 Pa.Super. 78, 92, 682 A.2d 1314 (1996) (mother's former same-sex partner could pursue visitation because she stood in loco parentis to child); *Holtzman v. Knott*, 193 Wis.2d 649, 694, 533 N.W.2d 419, cert. denied, 516 U.S. 975, 116 S.Ct. 475, 133 L.Ed.2d 404 (1995) (same sex partner can seek visitation when she has parent-like relationship with child and significant triggering event justifies State intervention in child's relationship with biological or adoptive parent); *A.C. v. C.B.*, 113 N.M. 581, 586, 829 P.2d 660 (1992) (standing based on deprivation of right to maintain continuing relationship with

We disagree with the defendant's assertion that this result restricts her fundamental right, as a fit parent, to the custody of her child. A parent's liberty interest in her relationship with her child is grounded in art. 10 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Opinion of the Justices*, 427 Mass. 1201, 1203, 691 N.E.2d 911 (1998). Parental rights, however, are not absolute. *Id.* Indeed, postadoption visitation by members of an adoptee's natural family is constitutionally permissible, *Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption, supra*, as is visitation by grandparents. G.L. c. 119, § 39D. We must balance the defendant's interest in protecting her custody of her child with the child's interest in maintaining her relationship with the child's de facto parent.[12] See *M.J.C. v. D.J.*, 410 Mass. 389, 393, 572

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child). Jurisdictions that have reached the opposite result differ from ours because their statutory law supplants the equitable powers of their courts. See, e.g., *West v. Superior Court*, 59 Cal.App.4th 302, 309, 69 Cal.Rptr.2d 160 (1997) (court lacked jurisdiction to enter order granting visitation rights to former partner because statutory law occupies field of child visitation); *Music v. Rachford*, 654 So.2d 1234 (Fla.Dist.Ct.App.1995) (per curiam) (visitation rights with regard to nonparent solely statutory); *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 656, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991) (same sex partner not parent within meaning of domestic relations statute). But see *Lynda A.H. v. Diane T.O.*, 243 A.D.2d 24, 27, 673 N.Y.S.2d 989 (1998) (same sex partner denied visitation because it impermissibly impaired biological mother's right to custody and control of child).

[12] On this point we take a different view from the dissent. The dissent stresses the interference with the defendant's

N.E.2d 562 (1991); *C.C. v. A.B.*, 406 Mass. 679, 691, 550 N.E.2d 365 (1990). The intrusion on the defendant's interest is minimal. What tips the scale is the child's best interests. "The first and paramount duty of courts is to consult the welfare of the child." *Youmans, supra* at 782, 711 N.E.2d 165 (1999), quoting *Richards v. Forrest*, 278 Mass. 547, 553, 180 N.E. 508 (1932).

Moreover, this case differs from cases in which a putative father's paternity suit disrupts an existing family unit. The family that must be accorded respect in this case is the family formed by the plaintiff, the defendant, and the child. The defendant's parental rights do not extend to the extinguishment of the child's relationship with the plaintiff. See *Opinion of the Justices, supra* (overriding principle in determining right of parent to custody must be best interests of child); *Richards v. Forrest*, 278 Mass. 547, 553, 180 N.E. 508 (1932) ("Parents are the natural guardians of their minor child and entitled to its custody. But they have no absolute property right of which they can in no way be deprived without their consent. Their right will not be enforced to the detriment of the child"). The child's interest in maintaining his filial ties with the plaintiff counters the defendant's custodial interest. See *Opinion of the Justices, supra* at 1206, 691 N.E.2d 911; *Adoption of Tammy*, 416 Mass. 205, 214-215, 619 N.E.2d 315 (1993) ("As the case law and commentary on the subject illustrate, when the functional parents of children born [to a mother and her same sex partner]

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control over the child's upbringing while discounting the child's interest in maintaining a relationship with his other parent.

separate or one dies, the children often remain in legal limbo for years while their future is disputed in the courts. . . . In some cases, children have been denied the affection of a functional parent who has been with them since birth, even when it is apparent that this outcome is contrary to the children's best interests"). The only family the child has ever known has splintered. The child "is entitled to be protected from the trauma caused by the disruption" of his relationship with the plaintiff.[13] *Youmans, supra* at 784, 711 N.E.2d 165.

We conclude that, on these facts, the Probate Court properly allowed the plaintiff's motion for temporary visitation with the child. We affirm the order of the single justice reinstating the Probate Court judge's order for temporary visitation.

So ordered.

FRIED, J. (dissenting, with whom LYNCH, J., joins).

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[13] The defendant further argues that the Probate Court judge erred by failing to hold a full evidentiary hearing before ordering temporary visitation. She asserts that she should have had the opportunity to cross-examine the guardian ad litem and to present the testimony of family members and the child's counsellor. We disagree. The judge properly solicited a preliminary report of the guardian ad litem and gave both parties an opportunity to be heard on the report and the motion for visitation. The visitation order is temporary and may be altered or even vacated on a trial on the merits. The case cited by the defendant, *Gilmore v. Gilmore*, 369 Mass. 598, 341 N.E.2d 655 (1976), is distinguishable because the error in that case was the refusal of the judge to permit the guardian ad litem to testify at a trial on the merits in a divorce case. *Id.* at 604, 341 N.E.2d 655. The action before us has not proceeded to trial and thus is not subject to the same procedural requirements.

At the instance of a plaintiff related neither by blood nor marriage to either the minor child or the child's biological mother, a probate judge has ordered the mother to allow the plaintiff rather extensive visitation rights with the child. There has been no allegation, much less any finding, that the mother has failed in any recognized legal duty to the child. Nor was the mother or child ever subject to the jurisdiction of the Probate Court in some other proceeding or for some other reason. This mother is, in every way relevant to the law, like any other mother properly caring for her child. And yet at the instance of a person who is legally a stranger to the mother-child relationship, a Probate Court has entered an order significantly interfering with the mother's control over her child's upbringing.

The probate judge's order in this case was wholly without warrant in statute, precedent, or any known legal principle, and yet the majority of this court has upheld it. As such, the opinion the court delivers today is a remarkable example of judicial lawmaking. It greatly expands the courts' equity jurisdiction with respect to the welfare of children and adopts the hitherto unrecognized principle of de facto parenthood as a sole basis for ordering visitation. Even while expanding judicial authority and making an addition to the common law, the court speaks as though its decision were nothing extraordinary. In light of the denigration of parental rights and the judicial infringement on the province of the Legislature effected by the court's decision, all without an acknowledgment of the novelty of that decision, I must respectfully dissent.

I

The court's purported basis of jurisdiction in this case is G.L. c. 215, § 6, under which the Probate Court has "original and concurrent jurisdiction with the supreme judicial court and the superior court department of all cases and matters of equity cognizable under the general principles of equity jurisprudence." The equity jurisdiction of the Probate Court, including jurisdiction over the welfare of children, is wide indeed, but at least two principles constrain the court's authority to intervene in family relations. The first is the concept that general equity principles permit courts to award relief only where the plaintiff has stated a legally recognizable claim on which relief can be granted. In *C.M. v. P.R.*, 420 Mass. 220, 649 N.E.2d 154 (1995), for example, a man other than the child's biological father sought to have the court establish his paternity under the equitable powers granted by § 6. The court acknowledged that the statute itself did not limit the scope of equity jurisdiction, but rejected the plaintiff's claim because he had not alleged biological paternity and therefore "did not assert a ground on which relief could be granted." *Id.* at 223, 649 N.E.2d 154. See *Enos v. Correia*, 38 Mass.App.Ct. 318, 323 n. 11, 647 N.E.2d 1215 (1995), quoting R.W. Bishop, Prima Facie Case, Proof and Defense § 1262 (3d ed.1987) (refusing to grant visitation to grandparents under general equity principles because "matters of equity jurisprudence include 'cases in which the subject matter of the controversy is one recognized by the courts at common law, but in which the remedy at law is not plain, adequate and complete' " and because "[t]here is no common law right to grandparent visitation"). As in *C.M. v. P.R.*, *supra*,

the plaintiff here has stated no theory recognized under current Massachusetts law that justified the court in awarding visitation rights.[1]

The second, closely related, principle that should have constrained the court from reaching the decision it did is that it has never been supposed that a probate judge may simply drop into a family relation without any particular legal warrant and decree that a parent must follow a particular course in the upbringing of that child, when that course is not otherwise prescribed by law or its contrary forbidden by law. The courts, if there is not an adoption proceeding or some other proceeding regarding the custody of a child, do not have a free-ranging mandate to act in loco parentis in the absence of an allegation of unfitness, abuse, or deprivation of necessities. See, e.g., *Care & Protection of Robert*, 408 Mass. 52, 556 N.E.2d 993 (1990); *Custody of a Minor*, 389 Mass. 755, 452 N.E.2d 483 (1983); *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978).

The court's reliance on *Youmans v. Ramos*, 429 Mass. 774, 711 N.E.2d 165 (1999), as support for its acceptance of jurisdiction here is unconvincing. The court in *Youmans* specifically stated that the "right (or standing) of [a non-parent] to seek visitation privileges with a minor child is not at issue in this case." *Id.* at 780, 379 N.E.2d 1053. Moreover, the court ignores the fact that in *Youmans*, the court already had jurisdiction over the child's welfare for

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[1] The court observes that in *C.M. v. P.R.*, 420 Mass. 220, 649 N.E.2d 154 (1995), we did not address the de facto parent doctrine. Indeed we did not, as the term was unknown to the jurisprudence of this court and only makes its entrance today.

the legitimate purpose of transferring custody of the child from a third person back to her natural father. *Youmans* does not provide support for the court's decision in this case to intervene in the child's upbringing and declare what is in the child's best interests without any legal predicate for doing so.[2] And the court's invocation of the discussion in *Youmans* of a "parent-like relationship" is inapposite. Unlike *Youmans*, where the person to whom visitation was granted had previously had legal custody of the child and therefore had stood as a legally adjudicated guardian, in a parent-like relationship to the child, the plaintiff here has never had formal custody of the child and stands in a parent-like relationship with the child only in the novel sense announced here and not previously recognized by the law of the Commonwealth.[3]

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[2] The fact that the petitioner here is now seeking to share custody of the child and to adopt the child does not, as the court suggests, provide a predicate for awarding visitation, because those other claims are baseless. There is no basis for awarding custody for the reasons discussed here, and there is no basis for an adoption order without the consent of the child's living parent unless the standard set out in G.L. c. 210, § 3, for dispensing with consent to adoption has been met.

[3] The court's citation to *Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption*, 392 Mass. 696, 702, 703, 467 N.E.2d 861 (1984), is similarly inapposite. There, the court dispensed with the mother's consent to her child's adoption by someone else due to the mother's unfitness and simultaneously granted postadoption visitation to the mother. Thus, unlike the instant case, the person granted visitation in that case was not only parent-like, but was actually the child's biological mother.

II

In determining that the plaintiff should be granted temporary visitation with the child, the court oscillates between two rationales, as it must. The opinion claims to rest on the best interests of the child, so as to avoid the criticism that it is enforcing a contract between the parties. But in order to ward off the equal and opposite criticism that the court is granting an open-ended authority to interfere with a fit parent's otherwise lawful control of her young child, the court must emphasize the special circumstances of the parties' arrangements and agreements even though those have no bearing on determining the child's best interests but only on the expectations of the mother's former partner. The court oscillates, but it does not come to rest.

The court's attempt to distinguish its recent decision in *C.M. v. P.R.*, 420 Mass. 220, 649 N.E.2d 154 (1995), illustrates its focus on the relationship between the petitioner and the mother. The facts of *C.M.* are very similar to the facts in this case except that the person seeking visitation rights was a man who had lived with the child's mother. Like the plaintiff here, the man was neither the biological parent of the child nor married to the parent, nor did he have a legal obligation to support the child. But the plaintiff attended child birth classes with the mother, chose the child's name with the mother, lived with the mother and child for the first three years of the child's life, and served at times as the child's primary caretaker, and his name appeared on the child's birth certificate as the child's father. See *id.* at 221, 649 N.E.2d 154. We concluded that his "devotion to the child does not, without more, permit an adjudication of paternity *or*

visitation privileges" (emphasis supplied). *Id.* at 223, 649 N.E.2d 154. In distinguishing *C.M.*, the court relies in part on a factor irrelevant to the best interests of the child – that, "[a]lthough the plaintiff [in *C.M.*] had been living with the mother for several months prior to the birth of the child, he had not been part of the decision to create a family by bringing a child into the world." *Ante* at 830, 711 N.E.2d 886. The court ignores the three-year period during which the plaintiff in *C.M.* had lived with the child and its mother "as a family" after the child's birth, *id.* at 221, 649 N.E.2d 154, yet surely events occurring during the child's life are more relevant to the child's well-being than decisions or arrangements concluded between the mother and her partner before the child's birth. By giving such weight to this factor, the court makes evident that it is not the child's interest that motivates this decision, but a desire to acknowledge and give status to the arrangements made between the plaintiff and the mother before the child was even conceived.

III

The court today adopts a "de facto parent" doctrine, citing a tentative draft of the American Law Institute and cases from other States. We are told that a "de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. . . . The de facto parent

shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide." *Ante* at 829, 711 N.E.2d 886.

Although the law of the Commonwealth has never recognized such a concept, and indeed in *C.M. v. P.R.*, *supra* at 224, 649 N.E.2d 154, in effect rejected it, the court discusses its application here as though it were neither new nor remarkable. The number of fresh avenues for judicial intervention created by this rule is limited only by the number of possible family arrangements in which adults and children live in the same household. In adopting the rule, the court strives to provide for the special needs of "non-traditional families," yet it is just because many families are non-traditional that the rule creates such a potential for unwarranted judicial intrusion into family relations.[4] One could imagine many situations in which an adult, legally a stranger to the child, might reside with the child's parents and, by participating in the child's upbringing to a certain degree, claim a legal status with respect to the child under the rule the court delivers today.

What defines the boundaries of the de facto parent doctrine? The court provides no limit aside from the description set out above which, as we have seen, is

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[4] It should be noted that our law does make some such provisions. The Legislature provided for visitation rights for grandparents, see G.L. c. 119, § 39D, and we have recognized that the plaintiff would have been allowed, with the mother's consent, to adopt this child. See *Adoption of Tammy*, 416 Mass. 205, 619 N.E.2d 315 (1993).

hardly any limit at all. The court here makes much of the couple's decision "together to bring a child into the world" and the subsequent contract between the parties "in which they expressly stated their intent to coparent a child." *Ante* at 825, 711 N.E.2d 886. But the court does not explain why this particular litigant should be permitted to rely on a contract regarding the child's welfare instead of establishing parental rights through adoption. The failure to adopt specifically counted against the plaintiff's claim of parental rights in *C.M. v. P.R., supra* at 223 n. 5, 649 N.E.2d 154. And it is clear from this court's decision in *Adoption of Tammy,* 416 Mass. 205, 619 N.E.2d 315 (1993), that the plaintiff here would have been permitted to adopt if the child's mother had consented. Even the ALI tentative draft on which the court relies provides that "an adult who expects status as a parent should obtain that status through formal adoption, if available under the applicable state law. Failure to adopt the child when it would have been possible is some evidence" that the person's relationship with the child does not rise to the level of de facto parenthood. ALI Principles of the Law of Family Dissolution § 2.03 comment b, at 41 (Tent. Draft No. 3 Part I 1998). Moreover, the draft identifies the "primary function of the [de facto parent] status" as "enabl[ing] the court to maintain relationships between children and adults who have functioned as parents when adoption was not possible or practical." *Id.*

Although the court expressly declines to reach the issue "whether a coparenting agreement executed by the parties is specifically enforceable," it is clear that it places great importance on the contract between the parties in this case. If it did not, its frequent mentions of that

agreement would be irrelevant. The fact that an adult has agreed to assume responsibility for raising a child, apart from whether she has actually done so, is irrelevant to the child's best interests. It neither proves that the adult is fit to care for the child nor, in the case of an adult otherwise without any legal relationship to the child, that the child has some heightened bond of affection with the adult that justifies granting her visitation rights as the court has done here. Moreover, such a contract could not be binding on the Probate Court once that court had jurisdiction over the child's custody, as the court will not enforce agreements "concern[ing] children . . . that do not conform to the child's best interests." *Wilcox v. Trautz*, 427 Mass. 326, 334 n. 7, 693 N.E.2d 141 (1998).[5] See *R.R. v. M.H.*, 426 Mass. 501, 510-511, 689 N.E.2d 790 (1998); *Osborne v. Osborne*, 384 Mass. 591, 428 N.E.2d 810 (1981); *Knox v. Remick*, 371 Mass. 433, 437, 358 N.E.2d 432 (1976); *Jenkins v. Jenkins*, 304 Mass. 248, 250, 23 N.E.2d 405 (1939). Therefore, the fact that the parties expressed in the contract their "beliefs regarding the child's best interests"

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[5] It is surprising that the court cites *Wilcox v. Trautz*, 427 Mass. 326, 693 N.E.2d 141 (1998), as if it somehow supported its decision, and its parenthetical characterization of note 7 in *Wilcox*, from which the court appears to draw comfort, is even more surprising. The full text of that footnote is as follows:

> "The parties have no children, and thus the agreement did not raise any issues regarding the legal restrictions on their ability to affect the rights of their children by the agreement. As to agreements that do concern children, we would not, in any event, enforce those that do not conform to the children's best interests" (citations omitted).

Id. at 334 n. 7, 693 N.E.2d 141.

does not, as the court implies, entitle the agreement to any special deference.

Evidence of the great weight the court affords this agreement is the court's statement that the child's interest in maintaining his filial ties with the plaintiff counters the defendant's custodial interest. See *ante* at ___. The use of the adjective "filial" begs the question. I would have thought it quite clear that a Probate Court has no business interfering with a fit parent's upbringing of her child just because the Probate Court thinks that the child has an interest in maintaining certain "ties." Such a power surely would not extend to relationships with teachers, schoolmates, clergy, or friends. So the adjective "filial" must be doing all the work here. The court is trying to show that there is something so special about this relationship that it may be distinguished from all those other ties, including, I suppose, that of the former male partner in *C.M.* But there is nothing about the child's interests that justifies the distinction; a child might be as emotionally attached to friends, teachers, schoolmates, or the child's mother's former boy friend, as to someone in the plaintiff's position. It is, rather, the plaintiff's interests and the arrangements the plaintiff made with the mother that are treated as distinctive here. To see these arrangements as rendering the ties "filial" is indeed to promote those contractual arrangements to a special status.[6]

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[6] The court does suggest, *ante* at ___, that a judge may consider the factors set out in this court's decision in *C.C. v. A.B.*, 406 Mass. 679, 550 N.E.2d 365 (1990), but the facts of that case were very similar to the facts in *C.M. v. P.R.*, 420 Mass. 220, 649 N.E.2d 154 (1995), which this court does not view as presenting a de facto parenthood situation. The only distinction

What the court must be saying is that a contract of union between a same-sex couple creating expectations of mutual care for a child stands on a special footing. The subject of same-sex unions is difficult, controversial, and important. The court's decision is a clear step in granting legal force to such unions. But if that is what the court intends, it should say so directly. See Shapiro, In Defense of Judicial Candor, 100 Harv. L.Rev. 731 (1987). In my view, it is precisely the sort of question that deserves the attention of the Legislature. We should not back into it by indirection, as the court does here.

A bold statement granting judicial recognition to same-sex unions would at least place quite distinct limits, analogous to those now familiar to the law, on the otherwise utterly amorphous authority the court seems to bestow today. Thus the danger that the court's decision might be used in as yet unforeseen circumstances to deprive parents of their constitutionally protected relationships with their children would be diminished. This is not to say that limiting the court's decision to same-sex unions would eliminate all ambiguity. Many vexing questions would remain. What exactly is to count as such a

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to which the court can point is that "[u]nlike C.M., the plaintiff before us was intimately involved in the decision to bring the child into the world." *Ante* at 830, 711 N.E.2d 886. This is yet another indication of the deferential treatment the court accords to the agreement between the plaintiff and the mother.

Notably, the court fails to point out that the distinction between *C.M. v. P.R.* and *C.C. v. A.B.* is not some amorphous consideration of which plaintiff had a stronger emotional bond with the child, but that the plaintiff in *C.C.* alleged biological paternity, whereas the plaintiff in *C.M.* did not.

marriage-like commitment? When does a coparenting agreement constitute the equivalent of such a commitment? Is either sufficient to create the rights the court seems to acknowledge today, or are both necessary? How is such a union to be terminated, and what are the other incidents – support and alimony, for instance – that may arise when it is terminated? Only the Legislature is in a position to deal systematically and comprehensively with this important subject. Our imprecise, indirect, and piecemeal entry into this field can only cause confusion.

IV

Of course, if there is some constitutional basis for the recognition of same-sex marriages, the matter is no longer entirely at the Legislature's discretion. By its emphasis on the marriage-like arrangements and agreements between the plaintiff and the mother, which are hardly relevant to the purported basis of the court's decision – the best interests of the child – the court appears to take a step in that direction.

And how else can the court find enough to outweigh what the court admits is a long-standing constitutional right – the "fundamental liberty interest" of parents in raising their children without interference by the State? *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). See *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). The court states that "[p]arental rights . . . are not absolute." *Ante* at 832, 711 N.E.2d 886. But this maxim is taken completely out of context, for the cases in which parental rights have been

trumped by the best interests of the child or other concerns are those in which there has been an allegation of abuse or an allegation that a parent has withheld necessities such as medical care, or where the parent has consented to her child's adoption by another person. The court attempts to bolster its dismissal of the defendant's claim that her parental rights should take precedence by noting that a court is constitutionally permitted to order postadoption visitation with a child by members of the child's biological family and that courts are also permitted to order visitation by grandparents. These examples are entirely irrelevant. In the case of postadoption visitation by an adoptee's natural family, the court already has jurisdiction over the welfare of the child and determines that, in the best interests of the child, postadoption visitation should be incidental to the adoption. See *Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption*, 392 Mass. 696, 702, 467 N.E.2d 861 (1984). In this case, by contrast, there is no such basis for interfering with the prerogatives of a child's legal parent. The court's reliance on grandparent visitation rights is equally unhelpful to its case. The Legislature has explicitly created such rights for grandparents, see G.L. c. 119, § 39D, and, as the Appeals Court has noted, there is no common-law right to grandparent visitation. See *Enos v. Correia*, 38 Mass.App.Ct. 318, 323 n. 11, 647 N.E.2d 1215 (1995). The Legislature has made no such decision with respect to visitation by third parties not related to the child.

ARTICLE I

§ 1. Legislative powers

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

ARTICLE III

§ 1. Judicial power; tenure of office

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

§ 2. Jurisdiction

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

ARTICLE VI

Debts; supremacy; oath

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposal and Ratification

See note under Amendment [I].

Amendment [IX.]

Construction of enumerated rights

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Proposal and Ratification

See note under Amendment [I].

Amendment XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. XXX. Separation of legislative, executive and judicial departments

ART. XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

M.G.L.A. 119 § 23

MASSACHUSETTS GENERAL LAWS ANNOTATED
PART I ADMINISTRATION OF THE GOVERNMENT
TITLE XVII PUBLIC WELFARE
CHAPTER 119. PROTECTION AND
CARE OF CHILDREN,
AND PROCEEDINGS AGAINST THEM
PROTECTION OF CHILDREN

Current through 1998 2nd Annual Sess.

§ 23. Responsibility of department to provide foster care for children; grandparent visitation; child profile form; assignment of support rights.

The department shall have the responsibility, including financial responsibility, for providing foster care for children through its own resources or by use of appropriate voluntary agencies according to the rules and regulations of the department in the following instances:

A. Upon the application of a parent or guardian or any person acting in behalf of the child, or of the child himself, the department may accept for foster care any child under eighteen years who in its judgment is in need of foster care. Said judgment shall be exercised in accordance with guidelines and standards developed by said department and shall be reviewed by the executive office of human services. Such acceptance shall entail no abrogation of parental rights or responsibilities, but the department may accept from parents a temporary delegation of certain rights and responsibilities necessary to provide the foster care for a period of time under conditions agreed upon by both and terminable by either.

Whenever the child is placed in family foster care, the court shall ensure that grandparents, upon their request, have access to reasonable visitation rights with the child who is the subject of the petition and that the department establish a schedule for such visitation unless it is determined by the court or the department that such visitation is not in the child's best interests. In determining the best interests of the child the court or the department shall consider the goal of the service plan and the relationship between the grandparents and the child's parents or legal guardian. Grandparents who are denied the right to visit with said child may appeal a denial by the department through the department's fair hearing process. The department may establish reasonable conditions governing grandparents visitation, including but not limited to requiring that the grandparents be restrained from revealing the whereabouts of the child's placement.

The court shall, whenever reasonable and practical, and based upon a determination of the best interests of the child, ensure that children placed in foster care who are separated from siblings who are either in other foster or pre-adoptive homes, or in the homes of parents or extended family members, have access to, and visitation rights with, such siblings throughout the period of placement in the care and custody of the commonwealth, or subsequent to such placements if the children or their siblings are separated through adoption or long-term placements in foster care.

The courts shall determine, at the time of initial placements wherein children and their siblings are separated through placements in foster, pre-adoptive, or

adoptive care, that such visitation rights be implemented through a schedule of visitations or supervised visitations to be arranged and monitored through the appropriate public or private agency, and with the participation of the foster, pre-adoptive or adoptive parents, or extended family members, and other parties who are relevant to the preservation of sibling relationships and visitation rights. Periodic reviews shall be conducted, so as to evaluate the effectiveness and appropriateness of the visitations between siblings placed in care.

B. The department may accept from parents voluntary surrender of custody of their children under eighteen years for purposes of giving consent for adoption under the same conditions as noted in paragraph A of this section.

C. The department may seek and shall accept on order of a probate court the responsibility for any child under eighteen years of age who is without proper guardianship due to the death, unavailability, incapacity or unfitness of the parent or guardian, or on the consent of the parent or parents. Such responsibility shall include the right to determine the child's place of abode, medical care, and education; to control visits to the child; to give consents to enlistments, marriages and other contracts requiring parental consent, such responsibility to include the right to consent to adoption only when it is expressly included in the order of the court. If such child is in the care of the department of mental health or the department of mental retardation, the responsibility enumerated above and all rights therein contained shall continue in the department. The department shall continue to have

such responsibility for a mentally retarded person notwithstanding the fact that such person has reached the age of eighteen years, if the department has accepted responsibility for such person prior to his reaching the age of eighteen years and such person has been declared to be legally incompetent. Such responsibility shall continue in the department until such person shall be declared to be no longer legally incompetent.

Whenever the child is placed in family foster care, the court shall ensure that grandparents, upon their request, have access to reasonable visitation rights with the child who is the subject of the petition and that the department establish a schedule for such visitation unless it is determined by the court or the department that such visitation is not in the child's best interests. In determining the best interests of the child the court or the department shall consider the goal of the service plan and the relationship between the grandparents and the child's parents or legal guardian. Grandparents who are denied the right to visit with said child may appeal a denial by the department through the department's fair hearing process. The department may establish reasonable conditions governing grandparents visitation, including but not limited to requiring that the grandparents be restrained from revealing the whereabouts of the child's placement.

D. The department shall accept on commitment from any division of the juvenile court department any child under eighteen years of age declared in need of foster care under section twenty-six or to be a child in need of services under section thirty-nine G.

E. Any child under eighteen years who is left in any place and who is seemingly without a parent or legal guardian available shall be immediately reported to the department, which shall proceed to arrange care for such child temporarily and shall forthwith cause search to be made for parent or guardian. If parent or guardian cannot be found or is unable or refuses to make suitable provisions for the child, the department shall make such lawful provision as seems for the best interest of such child within the provisions of this chapter.

F. If the department has in its care a child whose parent or parents have consented to his adoption and the department has been unable to place such child in an adoptive home within sixty days of the receipt of such consent, it shall so notify all children's foster care agencies in the commonwealth licensed to place children for adoption. Said notice shall request that each such agency attempt to find an adoptive home for such child. If one of said agencies locates an adoptive home for such child the department shall cooperate with such agency in the placement of the child in such home and in the supervision of the placement during the one year waiting period. Any person in whose home such child has been placed by the division shall also be informed by the department if such child has become eligible for adoption, and such person may request consideration as a prospective adoptive parent.

G. A temporary shelter care facility program or a group care facility, licensed under the provisions of chapter twenty-eight A, may, for a seventy-two-hour period, provide temporary shelter to a child under eighteen without parental consent, provided that the child's welfare

would be endangered if such shelter were not immediately provided. At the expiration of such seventy-two-hour period, the licensee shall (1) secure the consent of parent or guardian to continued custody and care, (2) refer the child to the department for custody and care, or (3) refuse to provide continued care and custody to said child.

H. The department may pay a sum not exceeding eleven hundred dollars for the funeral and burial of a child in its care provided that the cost of funeral and burial does not exceed fifteen hundred dollars and there are insufficient resources to pay for the cost of such funeral and burial. Any resources of the child shall be deducted from the maximum cost of the funeral and burial allowable hereunder and the difference, subject to the limitation set forth in this paragraph, shall be paid by the department.

Whenever a child is placed in a foster home, or is transferred from one foster home to another, or from a state facility for the care of children to a foster home, a completed child profile form shall precede or accompany the child to the foster home.

In the case of an emergency placement, such child profile form shall be received by the foster parents from the department, the department of youth services, the department of mental health, other departments of the commonwealth responsible for the placement of foster children, or placement agency within ten days of the child's placement in the foster home. At the time of an emergency placement, the department, the department of youth services, the department of mental health, other

departments of the commonwealth responsible for the placement of foster children, or placement agency shall provide to the foster parents, in verbal or written form, a brief statement describing the child's outstanding problem behaviors and mental and emotional problems.

The department shall develop a child profile form which shall be used by all other departments of the commonwealth or placement agencies and which shall contain the child profile and any other relevant information necessary to the care, well-being, protection, and parenting of the child by the foster parents. Said child profile shall contain, but not be limited to, a history of the child's previous placements and reasons for placement changes; a history of the child's problem behaviors and mental and emotional problems; educational status and school related problem behaviors, and any other psychological, educational, medical, and health information necessary.

The child profile form shall immediately be prepared by the department of the commonwealth which is granted care and custody of the child at the time such care and custody is granted.

The department may continue to have the responsibility for any person provided for in this section under twenty-one years for the purposes of specific educational or rehabilitative programs, under conditions agreed upon by both the department and such person and terminable by either.

The department shall obtain and provide to the IV-D agency, as set forth in chapter one hundred and nineteen A, an assignment of support rights on behalf of each child

receiving foster care maintenance payments pursuant to Title IV, Part E, of the Social Security Act, including, but not limited to the following information: the child's name, date of birth, place of birth, Social Security number, address and benefit level and, if known, each parent's name, date of birth, place of birth, Social Security number, most recent address and most recent employer. The department shall notify said IV-D agency forthwith when a child for whom support is collected no longer receives foster care maintenance payments pursuant to Title IV, Part E, of the Social Security Act.

MASSACHUSETTS GENERAL LAWS ANNOTATED
PART I. ADMINISTRATION OF THE GOVERNMENT
TITLE XVII PUBLIC WELFARE
CHAPTER 119. PROTECTION AND
CARE OF CHILDREN,
AND PROCEEDINGS AGAINST THEM
PROTECTION OF CHILDREN

Current through 1998 2nd Annual Sess.

§ 39D. Visitation rights to certain grandparents of unmarried minor children; place to file petition.

If the parents of an unmarried minor child are divorced, married but living apart, under a temporary order or judgment of separate support, or if either or both parents are deceased, or if said unmarried minor child was born out of wedlock whose paternity has been adjudicated by a court of competent jurisdiction or whose father has signed an acknowledgement of paternity, and the parents do not reside together, the grandparents of

such minor child may be granted reasonable visitation rights to the minor child during his minority by the probate and family court department of the trial court upon a written finding that such visitation rights would be in the best interest of the said minor child; provided, however, that such adjudication of paternity or acknowledgment of paternity shall not be required in order to proceed under this section where maternal grandparents are seeking such visitation rights. No such visitation rights shall be granted if said minor child has been adopted by a person other than a stepparent of such child and any visitation rights granted pursuant to this section prior to such adoption of the said minor child shall be terminated upon such adoption without any further action of the court.

A petition for grandparents visitation authorized under this section shall, where applicable, be filed in the county within the commonwealth in which the divorce or separate support complaint or the complaint to establish paternity was filed. If the divorce, separate support or paternity judgment was entered without the commonwealth but the child presently resides within the commonwealth, said petition may be filed in the county where the child resides.

MASSACHUSETTS GENERAL LAWS ANNOTATED
PART II. REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
TITLE III. DOMESTIC RELATIONS
CHAPTER 208. DIVORCE
GENERAL PROVISIONS

Current through 1998 2nd Annual Sess.

§ 28. Children; care, custody and maintenance; child support obligations; provisions for education and health insurance; parents convicted of first degree murder.

Upon a judgment for divorce, the court may make such judgment as it considers expedient relative to the care, custody and maintenance of the minor children of the parties and may determine with which of the parents the children or any of them shall remain or may award their custody to some third person if it seems expedient or for the benefit of the children. In determining the amount of the child support obligation or in approving the agreement of the parties, the court shall apply the child support guidelines promulgated by the chief justice for administration and management, and there shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered. If, after taking into consideration the best interests of the child, the court determines that a party has overcome such presumption, the court shall make specific written findings indicating the amount of the order that would result from application of the guidelines; that the guidelines amount would be unjust or inappropriate under the circumstances; the specific facts of the case which justify departure from the guidelines; and that such departure is

consistent with the best interests of the child. Upon a complaint after a divorce, filed by either parent or by a next friend on behalf of the children after notice to both parents, the court may make a judgment modifying its earlier judgment as to the care and custody of the minor children of the parties provided that the court finds that a material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the children. In furtherance of the public policy that dependent children shall be maintained as completely as possible from the resources of their parents and upon a complaint filed after a judgment of divorce, orders of maintenance and for support of minor children shall be modified if there is an inconsistency between the amount of the existing order and the amount that would result from application of the child support guidelines promulgated by the chief justice for administration and management or if there is a need to provide for the health care coverage of the child. A modification to provide for the health care coverage of the child shall be entered whether or not a modification in the amount of child support is necessary. There shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered. If, after taking into consideration the best interests of the child, the court determines that a party has overcome such presumption, the court shall make specific written findings indicating the amount of the order that would result from application of the guidelines; that the guidelines amount would be unjust or inappropriate under the circumstances; the specific facts of the case which justify

departure from the guidelines; and that such departure is consistent with the best interests of the child. The order shall be modified accordingly unless the inconsistency between the amount of the existing order and the amount of the order that would result from application of the guidelines is due to the fact that the amount of the existing order resulted from a rebuttal of the guidelines and that there has been no change in the circumstances which resulted in such rebuttal; provided, however, that even if the specific facts that justified departure from the guidelines upon entry of the existing order remain in effect, the order shall be modified in accordance with the guidelines unless the court finds that the guidelines amount would be unjust or inappropriate under the circumstances and that the existing order is consistent with the best interests of the child. A modification of child support may enter notwithstanding an agreement of the parents that has independent legal significance. If the IV-D agency as set forth in chapter 119A is responsible for enforcing a case, an order may also be modified in accordance with the procedures set out in section 3B of said chapter 119A. The court may make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three, if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an

educational program, excluding educational costs beyond an undergraduate degree. When the court makes an order for maintenance or support of a child, said court shall determine whether the obligor under such order has health insurance or other health coverage on a group plan available to him through an employer or organization or has health insurance or other health coverage available to him at a reasonable cost that may be extended to cover the child for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of the child or obtain coverage for the child.

When a court makes an order for maintenance or support, the court shall determine whether the obligor under such order is responsible for the maintenance or support of any other children of the obligor, even if a court order for such maintenance or support does not exist, or whether the obligor under such order is under a preexisting order for the maintenance or support of any other children from a previous marriage, or whether the obligor under such order is under a preexisting order for the maintenance or support of any other children born out of wedlock. If the court determines that such responsibility does, in fact, exist and that such obligor is fulfilling such responsibility such court shall take into consideration such responsibility in setting the amount to paid under the current order for maintenance or support.

No court shall make an order providing visitation rights to a parent who has been convicted of murder in

the first degree of the other parent of the child who is the subject of the order, unless such child is of suitable age to signify his assent and assents to such order; provided, further, that until such order is issued, no person shall visit, with the child present, a parent who has been convicted of murder in the first degree of the other parent of the child without the consent of the child's custodian or legal guardian.

MASSCHUSETTS GENERAL LAWS ANNOTATED
PART II. REAL AND PERSONAL PROPERTY
AND DOMESTIC RELATIONS
TITLE III. DOMESTIC RELATIONS
CHAPTER 209C. CHILDREN BORN
OUT OF WEDLOCK

Current through 1998 2nd Annual Sess.

§ 5. Persons entitled to maintain actions or execute voluntary acknowledgment of parentage; parties

(a) Complaints under this chapter to establish paternity, support, visitation or custody of a child may be commenced by the mother, whether a minor or not; by a person presumed to be or alleging himself to be the father, whether a minor or not; by the child, whether a minor or not; by the child's guardian, next of kin, or other person standing in a parental relation to the child; by the parent or personal representative of the mother if the mother has died or has abandoned the child; by the parent or personal representative of the father if the father has died; by the authorized agent of the department of social services or any agency licensed under

chapter twenty-eight A provided that the child is in their custody; or, if the child is or was a recipient of any type of public assistance, by the IV-D agency as set forth in chapter 119A on behalf of the department of transitional assistance, the department of social services, the division of medical assistance or any other public assistance program of the commonwealth; provided, however, that if the mother of the child was or is married and the child's birth occurs during the marriage or within three hundred days of its termination by death, annulment or divorce, complaints to establish paternity under this chapter may not be filed by a person presumed to be or alleging himself to be the father unless he is or was the mother's husband at the time of the child's birth or conception.

(b) Voluntary acknowledgments of parentage may be executed by the mother and the putative father, whether either or both is a minor, and may be registered pursuant to section 11 only if the signatures of the mother and the father are notarized. If the mother of the child was or is married and the child's birth occurs during the marriage or within 300 days of its termination by divorce, a voluntary acknowledgment of parentage naming the putative father may be executed by the mother and the putative father only if the mother and the person who was the spouse of the mother at the time of the child's birth or conception sign an affidavit denying that the spouse is the father of the child; provided, however, that where the marriage has been terminated by annulment or by the death of either spouse, paternity of the putative father may only be established by filing a complaint to establish paternity as provided in this chapter. A mother

and a putative father signing a voluntary acknowledgment of parentage at the hospital or thereafter at the office of the city or town clerk as part of the birth registration process pursuant to section 3C of chapter 46, with the department of transitional assistance, with the IV-D agency set forth in chapter 119A, with any agency designated by the federal Secretary of Health and Human Services or with any official of a court shall receive notice orally, or through the use of video or audio equipment, and in writing of alternatives to signing the acknowledgment, including the availability of genetic marker testing, as well as the benefits and responsibilities with respect to child support, custody and visitation that may arise from signing the acknowledgment, and subsequently filing the acknowledgment with the court or with the registrar of vital records and statistics as provided in this chapter.

(c) Any agency or person living with such child who is actually furnishing support to the child or, if the child who is the subject of an action under this chapter is a recipient of public assistance, the department of transitional assistance, shall be made a party to any action for paternity or support under this chapter.

(d) The IV-D agency as set forth in chapter 119A on behalf of the department of transitional assistance, the department of social services, the division of medical assistance or any other public assistance program may not file complaints solely for custody or visitation, but shall be permitted to file actions for paternity or support; provided, however, that said IV-D agency shall be permitted to maintain an action for paternity or support even if issues related to custody or visitation are raised.

(e) In actions under this chapter relative to custody or visitation, the child, if the child is fourteen years of age or older, shall be made a party to such action.

MASSACHUSEETS GENERAL LAWS ANNOTATED
PART II. REAL AND PERSONAL PROPERTY
AND DOMESTIC RELATIONS
TITLE III. DOMESTIC RELATIONS
CHAPTER 209C. CHILDREN BORN OUT OF WEDLOCK

Current through 1998 2nd Annual Sess.

§ 10. Award of custody; criteria.

Section 10. (a) Upon or after an adjudication or voluntary acknowledgment of paternity, the court may award custody to the mother or the father or to them jointly or to another suitable person as hereafter further specified as may be appropriate in the best interests of the child.

In awarding custody to one of the parents, the court shall, to the extent possible, preserve the relationship between the child and the primary caretaker parent. The court shall also consider where and with whom the child has resided within the six months immediately preceding proceedings pursuant to this chapter and whether one or both of the parents has established a personal and parental relationship with the child or has exercised parental responsibility in the best interests of the child.

In awarding the parents joint custody, the court shall do so only if the parents have entered into an agreement pursuant to section eleven or the court finds that the

parents have successfully exercised joint responsibility for the child prior to the commencement of proceedings pursuant to this chapter and have the ability to communicate and plan with each other concerning the child's best interests.

(b) Prior to or in the absence of an adjudication or voluntary acknowledgment of paternity, the mother shall have custody of a child born out of wedlock. In the absence of an order or judgment of a probate and family court relative to custody, the mother shall continue to have custody of a child after an adjudication of paternity or voluntary acknowledgment of parentage.

(c) If either parent is dead, unfit or unavailable or relinquishes care of the child or abandons the child and the other parent is fit to have custody, that parent shall be entitled to custody.

(d) If a person who is not a parent of the child requests custody, the court may order custody to that person if it is in the best interests of the child and if the written consent of both parents or the surviving parent is filed with the court. Such custody may also be ordered if it is in the best interests of the child and if both parents or the surviving parent are unfit to have custody or if one is unfit and the other files his written consent in court.

(e) In issuing any temporary or permanent custody order, the probate and family court shall consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child. For the purposes of this section, "abuse" shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and

child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury. "Serious incident of abuse" shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress. For purposes of this section, "bodily injury" and "serious bodily injury" shall have the same meanings as provided in section 13K of chapter 265.

A probate and family court's finding by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody, or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child. For the purposes of this section, an "abusive parent" shall mean a parent who has committed a pattern of abuse or a serious incident of abuse.

For the purposes of this section, the issuance of an order or orders under chapter 209A shall not in and of itself constitute a pattern or serious incident of abuse: nor shall an order or orders entered ex parte under said chapter 209A be admissible to show whether a pattern or serious incident of abuse has in fact occurred; provided, however, that an order or orders entered ex parte under said chapter 209A may be admissible for other purposes as the court may determine, other than showing whether

a pattern or serious incident of abuse has in fact occurred: provided further, that the underlying facts upon which an order or orders under said chapter 209A was based may also form the basis for a finding by the probate and family court that a pattern or serious incident of abuse has occurred.

If the court finds that a pattern or serious incident of abuse has occurred and issues a temporary or permanent custody order, the court shall within 90 days enter written findings of fact as to the effects of the abuse on the child, which findings demonstrate that such order is in the furtherance of the child's best interests and provides for the safety and well-being of the child.

If ordering visitation to the abusive parent the court shall provide for the safety and well-being of the child and the safety of the abused parent. The court may consider:

(a) ordering an exchange of the child to occur in a protected setting or in the presence of an appropriate third party;

(b) ordering visitation supervised by an appropriate third party, visitation center or agency;

(c) ordering the abusive parent to attend and complete, to the satisfaction of the court, a certified batterer's treatment program as a condition of visitation;

(d) ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding visitation;

(e) ordering the abusive parent to pay the costs of supervised visitation;

(f) prohibiting overnight visitation.

(g) requiring a bond from the abusive parent for the return and safety of the child;

(h) ordering an investigation or appointment of a guardian ad litem or attorney for the child; and

(i) imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent.

Nothing in this section shall be construed to affect the right of the parties to a hearing under the rules of domestic relations procedure or to affect the discretion of the probate and family court in the conduct of such hearing.

MASSACHUSETTS GENERAL LAWS ANNOTATED
PART III. COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
TITLE I. COURTS AND JUDICIAL OFFICERS
CHAPTER 215. PROBATE COURTS
COURTS AND THEIR JURISDICTION

Current through 1998 2nd Annual Sess.

§ 6. Equity jurisdiction.

The probate and family court department shall have original and concurrent jurisdiction with the supreme judicial court and the superior court department of all cases and matters of equity cognizable under the general

principles of equity jurisprudence and, with reference thereto, shall be courts of general equity jurisdiction, except that the superior court department shall have exclusive original jurisdiction of all actions in which injunctive relief is sought in any matter growing out of a labor dispute as defined in section twenty C of chapter one hundred and forty-nine.

Probate courts shall also have jurisdiction concurrent with the supreme judicial and superior courts, of all cases and matters in which equitable relief is sought relative to: (i) the administration of the estates of deceased persons; (ii) wills, including questions arising under section twenty of chapter one hundred and ninety-one; (iii) trusts created by will or other written instrument; (iv) cases involving in any way the estate of a deceased person or the property of an absentee whereof a receiver has been appointed under chapter two hundred or the property of a person under guardianship or conservatorship; (v) trusts created by parol or constructive or resulting trusts; (vi) all matters relative to guardianship or conservatorship; and (vii) actions such as one described in clause (11) of section three of chapter two hundred and fourteen and of all other matters of which they now have or may hereafter be given jurisdiction. They shall also have jurisdiction to grant equitable relief to enforce foreign judgments for support of a wife or of a wife and minor children against a husband who is a resident or inhabitant of this commonwealth, upon an action by the wife commenced in the county of which the husband is a resident or inhabitant. They shall, after the divorce judgment has become absolute, also have concurrent jurisdiction to grant equitable relief in controversies over

property between persons who have been divorced. They shall also have jurisdiction of an action by an administrator, executor, guardian, conservator, receiver appointed as aforesaid or trustee under a will to enjoin for a reasonable period of time the foreclosure, otherwise then by open and peaceable entry, of a mortgage on real estate, or the foreclosure of a mortgage on personal property, which real estate or personal property is included in the estate or trust being administered by such fiduciary, if in the opinion of the court the proper administration of the estate or trust would be hindered by such foreclosure. They shall also have jurisdiction, concurrent with the superior court, of proceedings in which equitable relief is sought under sections seven to twelve, inclusive, of chapter one hundred and seventeen and section twenty-six of chapter one hundred and twenty-three.

Notwithstanding any contrary or inconsistent provisions of the General Laws, procedure in cases in the probate court within the jurisdiction granted by this section shall be governed by the Massachusetts Rules of Civil Procedure.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

DUKES, SS DOCKET NO. 98E 0004 GC1

[E.N.O.],	)
Plaintiff,	)
	)
v.	)
	)
[L.M.M.],	)
Defendant.	)

TEMPORARY ORDER AND MEMORANDUM OF DECISION

This matter was before the Court (Cronin, J.) on August 13, 1998 for hearing on Plaintiff's Motion for Visitation. Visitation is hereby granted in accordance with the reasons and provisions set forth below. Also before the Court on August 13, 1998 were Defendant's Motion for the Appointment of a Guardian Pursuant to G.L. c. 233, § 20B and Defendant's Request for Report of Case and Stay of Proceedings.

I. BACKGROUND

The Plaintiff, [E.N.O] ("Plaintiff"), filed an equity action against Defendant, [L.M.M.] ("Defendant"), following the demise of a long-term lesbian relationship between the parties. The parties have known each other since 1984 and have maintained a committed relationship

since 1985. During the years of the relationship, the parties have signed numerous legal documents evidencing their commitment to each other as "life partners."

Since 1991, the parties planned to have children and raise them together. In anticipation of such, the parties underwent counseling and attended workshops regarding artificial insemination. The parties decided that Defendant would be the first to become pregnant since she is seven years older than Plaintiff and had gynecological problems that could delay pregnancy.

In 1993, Defendant was artificially inseminated and became pregnant. This pregnancy resulted in a miscarriage at ten weeks gestation. In June 1994, Defendant became pregnant again. During the pregnancy, the parties attended birthing classes together as well as parenting sessions for lesbian families. On February 23, 1995, Defendant gave birth to [B.] ("[B.]").

The parties agreed to raise [B.] in the Jewish faith. In accordance with tradition, [B.] was given Hebrew names in honor of deceases [sic] relatives of previous generations; "Binyamin" for [B.] after Plaintiff's Grandfather and "Hanan" for Andrew after Plaintiff's Grandmother.

Plaintiff and Defendant at all times referred to each other as [B.'s] parents. Before, and again after, [B.'s] birth, the parties executed several legal documents seeking to establish [Plaintiff] as [B.'s] other parent. These documents, copies of which are attached to the Complaint as Exhibits, included a Co-Parenting Agreement (Exhibit A),

a document designating [Plaintiff] as [B.'s] standby guardian (Exhibit C), and a nomination of Guardian of the Person and Property of [B.] whereby [Plaintiff] was designated as [B.'s] "co-guardian" (Exhibit D).

Plaintiff has been listed on all contracts and applications as [B.'s] parent and is listed as a contact person in case of an emergency. Plaintiff has claimed [B.] on her State and Federal income tax returns. [B.] refers to Plaintiff as "Mommy" and to Defendant as "Mama" and tells third parties that he has two mothers.

In Spring 1998, the parties' relationship began to deteriorate. On May 16, 1998, Plaintiff moved out of the family home. On July 11, 1998, in the Edgartown District Court, Defendant obtained an *ex parte* 209A Restraining Order against Plaintiff, alleging inter alia that Plaintiff had violently shaken [B.] and that she put [B.] and Defendant in fear. On July 29, 1998, following a one hour hearing in the Probate Court during which each party testified and introduced documentary evidence, the restraining order was not extended. Defendant has not seen [B.] since May 20, 1998.

On June 29, 1998, Plaintiff filed this equity action which consists of six counts. Plaintiff seeks, among other things, the following relief visitation between [B.] and Plaintiff, provision of child support by Plaintiff, and division of property of the partnership estate. On July 9, 1998, Defendant filed a Motion to Dismiss all counts of Plaintiff's complaint except for count five which requests a division of the partnership estate. On July 28, 1998, this Court (Cronin, J.) issued a Memorandum of Decision denying Defendant's Motion to Dismiss. On August 13,

1998, the parties appeared before the Court and were heard on the issue of visitation in light of the report of Robin M. Deutsch, Ph.D., who had been assigned as Guardian *ad litem* in this matter.

II. DISCUSSION ON PLAINTIFF'S MOTION FOR VISITATION

The policy of the Commonwealth towards its children is to serve their best interests. G.L. c 119, § 1. Moreover, children born to parents who are not married to each other are to be treated in the same manner as all other children. G.L. c. 209C, § 1. There is no statutory provision which addresses a child's right for continued contact with a nonbiological parental figure in his or her own life. It is well-established, however, that the visitation rights of a child of the Commonwealth may be governed by equity jurisdiction, if those rights are not otherwise codified. *Gardner v. Rothman,* 370 Mass. 79, 80-81 (1976); *Normand v. Barkei,* 385 Mass. 851, 852 (1982); *C.C. v. A.B.,* 406 Mass. 679, 690 (1990) (holding that the establishment of a "substantial parent-child relationship" is a fact-based question); *see also* G.L. c. 215, § 6. In *Adoption of Tammy,* 416 Mass. 205 (1993), a case involving a same-sex couple, the Court found that consideration of the factors outlined in *C.C. v. A.B.* to determine whether a substantial relationship existed was appropriate "with regard to establishing the status of legal parent," replacing the term "putative father" with the gender neutral term "parent." *Adoption of Tammy,* 416 Mass. at 213 n.7.

In *C.M. v. P.R.,* 420 Mass. 220 (1995), the Court affirmed the dismissal of a complaint for paternity

brought by a nonbiological parental figure. The man alleging paternity also sought custody and visitation. The Court held that neither General Laws Chapter 209C nor Chapter 215, Section 6 afforded him the relief he sought; his devotion to the child, without more, did not permit an adjudication of paternity or visitation privileges. *Id.* at 223. The Court's rationale, however, was focused on the fact that the man's complaint did not allege a duty to support the child or that visitation would be in the child's best interests. In the case at bar, however, Plaintiff readily asserts both her willingness to support [B.] and the fact that continued contact would be in [B.'s] best interests. The decision to have this child was made jointly by the parties. Plaintiff has had daily contact with [B.] since his birth and has acted in the capacity as his other parent in all aspects of his life.

In further support of granting Plaintiff visitation is the written report of the very capable Guardian *ad litem,* Robin M. Deutsch, Ph.D., (Dr. Deutsch) assigned to investigate this matter. In evaluating the advisability of visitation between Plaintiff and [B.], Dr. Deutsch spoke to present and former treating psychotherapists of Plaintiff as well as a couples therapist who treated the parties for more than one year. Dr. Deutsch asserts in her report that Plaintiff has been an active parent of [B.], is available to him, and is in tune with his needs. Dr. Deutsch has found no data to suggest that Plaintiff is in any way a danger to [B.]. Dr. Deutsch's conclusions, in essence, suggest that it would be appropriate and in [B.'s] best interests for Plaintiff to visit with [B.] once a week for two to four hours on Martha's Vineyard.

Dr. Deutsch further notes that "[t]his amount of contact would potentially be enough to maintain his attachment, address any potential fears of abandonment or loss, yet not create a status quo of significant contact and caretaking." At the same time, Dr. Deutsch points out that, "[e]ven if all contact between [B.] and [Plaintiff] is ultimately severed, by order of the Court, [B.] would not be hurt by temporary limited contact, and would ultimately be aided by a sensitive explanation for why he will not see [E.N.O.] again." Dr. Deutsch suggests the presence of another adult, however, to ensure that there is no direct contact between Plaintiff and Defendant in [B.'s] presence and also to provide insight regarding [B.'s] responses in making the transitions between the parties. Although Dr. Deutsch does not find a need for a third party for safety reasons, she notes that the person's presence will serve to reassure Defendant who claims she fears Plaintiff.

Based on all of the foregoing and in accordance with the well-reasoned recommendations of Dr. Deutsch which I find to be thoughtful and cogent, I find that a temporary order permitting limited visitation between Plaintiff and [B.] is appropriate and in [B.'s] best interests.

After hearing. IT IS ORDERED:

1. Dr. Deutsch's appointment as Guardian *ad litem* is continued in full force and effect. She shall provide an expanded evaluation and report regarding the issues of visitation and communication between Plaintiff and [B.].

2. The Plaintiff's Motion for Visitation is allowed pending the further investigation of the Guardian *ad litem*. Visitation shall occur on the

schedule as recommended by Dr. Deutsch. The first such visit shall occur during the week of August 24, 1998. all such meetings shall be supervised by a representative of the Early Childhood Program at Martha's Vineyard Community Services.

3. The parties shall equally bear the remaining cost of the Guardian *ad litem*. The $1,000.00 sum currently owed shall be paid within ten (10) days. The parties shall also equally bear the additional cost of the Guardian *ad litem* to conduct a further investigation.

4. *Sua sponte*, the Court appoints Attorney Bettina Borders of Borders, Littman & Peppard, PA, 81 Hawthorn Street, New Bedford, MA 02740 (508 990-1050) as attorney for the child. Attorney Borders' fees and expenses incurred in representing the child shall be shared equally by Plaintiff and Defendant.

5. Defendant's Motion for the Appointment of a Guardian pursuant to G.L. c. 233, § 20B is hereby allowed. The Court appoints Attorney Justin Maiona of Maiona & Maiona, 171 Milk Street, Boston, MA 02109 (617 695-2220) as Guardian for purposes of recommending whether the child's psychotherapist-patient privilege should be waived.

6. Defendant's Request for Report of Case and Stay of Proceedings is denied.

8/14/98
Date

/s/ John P. Cronin
John P. Cronin, Justice

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS. PROBATE & FAMILY COURT
DOCKET NO. 98E-0004

[E.N.O.],	*	[ORDER After Hearing. Motion Denied, as Per Temporary Order & Memo of Decision dated 8/14/98. 8/14/98 /s/ John P. Cronin]
Plaintiff,	*	
v.	*	
[L.M.M.],	*	
Defendant	*	

DEFENDANT'S REQUEST FOR REPORT OF CASE AND STAY OF PROCEEDINGS

(Filed Aug. 6, 1998)

The defendant in the above-entitled matter, [L.M.M.], hereby respectfully requests that this Honorable court report the questions of law set forth below, and any interlocutory orders of this Court, to the appeals court for determination, pursuant to G.L. ch. 215, §13 and Mass. Rule of Dom. Rel. Proc. 64, and enter a stay of all orders or further proceedings in this Court pending the determination of such appeal. In support of this Motion, the defendant says that the questions of law raised by Defendant's Motion to Dismiss and those set forth below, including the enforceability of certain purported agreements between the parties, the standing of the plaintiff to maintain this action and the jurisdiction of

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

PROBATE & FAMILY COURT
DEPARTMENT
DOCKET NO. 98E-0004-GCI

[E.N.O.], Plaintiff v. [L.M.M.], Defendant	MOTION FOR VISITATION [ORDER: After Hearing, and in accordance with recommendations of guardian *ad litem* (Dr. Deutsch), Motion allowed, *as per* Temporary Order and Memo of Decision dated 8-14-98. 8/14/98 /s/John P. Cronin]

(Filed Jun 29, 1998)

Now comes the Plaintiff, [E.N.O.], and moves this Court for an order as follows:

1. To order Defendant, [L.M.M.], to provide her visitation with [B.], age 3.

In support of this motion, see Plaintiff's Verified Complaint in Equity herein.

[E.N.O.]
by her attorney,
/s/ E. Oliver Fowlkes
E. Oliver Fowlkes
Fowlkes, Jacoby & Kaplan
7 Faneuil Hill Marketplace
Boston, MA 02109
(617) 742-8008
B.B.O. No. 176260

Dated: June 29, 1998

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

98-J-613

[E.N.O.]

vs.

[L.M.M.]

ORDER

The defendant seeks review of a temporary order entered in the above matter on August 14, 1998 (Dukes County Probate and Family Court, Docket No. 98E0004GCI, Cronin, J.).

Upon review of all the materials submitted and after hearing, I conclude that the ruling and the rationale of *C.M. v. P.R.*, 420 Mass. 220 (1995) control. ("When a man is neither the biological or adoptive father nor married to the mother, there is little authority that suggests a claim of a right to visitation or custody." *Id.* at 224).

Accordingly, it is hereby ordered that so much of the temporary order of the Probate and Family Court as allows visitation is stayed until such time as a trial on the merits may occur. all other requested relief is denied.

By the Court (Rapoza, J.)

/s/ Lena M. Wong
Assistant Clerk

Entered: August 28, 1998.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

98-J-613

[E.N.O.]

vs.

[L.M.M.]

AMENDED ORDER

The defendant seeks review of a temporary order entered in the above matter on August 14, 1998 (Dukes County Probate and Family Court, Docket No. 98E0004GCI, Cronin, J.).

Upon review of all the materials submitted and after hearing, I conclude that the ruling and the rationale of *C.M. v. P.R.*, 420 Mass. 220 (1995) control. ("When a man is neither the biological or adoptive father nor married to the mother, there is little authority that suggests a claim of a right to visitation or custody." *Id.* at 224).

Accordingly, it is hereby ordered that so much of the temporary order of the Probate and Family Court as allows visitation is vacated and any visitation is stayed until such time as a trial on the merits may occur. all other requested relief is denied.

By the Court (Rapoza, J.)

/s/ Lena M. Wong
Assistant Clerk

Entered: August 30, 1998.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL
COURT FOR
SUFFOLK COUNTY
No. 98-0555

[E.O.]

vs.

[L.M.]

MEMORANDUM AND ORDER

I have examined the papers in this case and heard the arguments of all counsel. I conclude that the petitioner is entitled to relief pursuant to G. L. c. 211, § 3, from the order entered by the single justice of the Appeals Court.

The case of *C.M. v. P.R.*, 420 Mass. 220, 223-224 (1995), in which the single justice of the Appeals Court relied, is distinguishable from this where co-parenting agreements exist, steps were being taken to formalize adoption of the child, and a substantial relationship had been developed between the child and the petitioner. The Probate judge acknowledged that the petitioner's lawsuit has a reasonable chance of success on its merits. He was guided by the report of the guardian ad litem, and was appropriately concerned that an absence of visitation between the petitioner and the child, pending what may be a lengthy delay in the resolution of the action, called for maintenance of the status quo to the extent possible. I conclude, as did the Probate judge, that there is no real risk of harm to the child from visitation.

The order of the single justice of the Appeals Court staying the Probate Court's order with respect to visitation by the petitioner with the child is vacated. The petitioner is to have visitation in accordance with the Probate Court's order and changes in that order are within the description of the Probate Court.

By the Court (Greaney, J.)

Illegible
Assistant Clerk

Entered: October, 23, 1998

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
THE PROBATE AND FAMILY COURT DEPARTMENT
DUKES COUNTY DIVISION
DOCKET NO. 98E 0004 GC1

[E.O.], Plaintiff	)	TEMPORARY ORDER
Vs.	)	
[L.M.], Defendant.	)	

This matter came before the Court on November 4, 1998. Counsel for plaintiff, counsel for defendant and counsel for child were present, as was [E.O.]. During the hearing, it was agreed by counsel for the parties that visitation should commence in accordance with the Order of this Court dated August 14, 1998 (p.n. 28). It was further agreed, however, that the Early Childhood Program at the Martha's Vineyard Community Services was not able to fully provide the services required by paragraph # 2 of the Temporary Order dated August 14, 1998 until November 25, 1998.

Therefore, pending further order of the Court, IT IS ORDERED THAT:

1. Visitation shall occur between [E.O.] and the child each Monday from 11:30 A.M. until 1:00 P.M., and each Friday from 11:30 A.M. until 1:00 P.M.

2. Each Monday visit shall be in the presence of and arranged by Nicole Vadasz of Martha's Vineyard Hebrew Center.

3. Each Friday visit shall be arranged by and in the presence of Cecilly Bryant of the Martha's Vineyard Community Services. The first visit shall commence Friday, November 6, 1998.

DATED: November 4, 1998

/s/ John P. Cronin /G.L.
John P. Cronin, Justice
Probate and Family Court

Supreme Court, U.S.
FILED
OCT 27 1999
OFFICE OF THE CLERK

No. 99-531

In The

Supreme Court of the United States

L.M.M.,

Petitioner,

v.

E.N.O.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARY L. BONAUTO
Counsel of Record

GARY D. BUSECK
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Attorneys for Respondent E.N.O.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts violated the Separation of Powers doctrine of the Massachusetts Declaration of Rights by granting, pursuant to its statutory equitable jurisdiction but without particular statutory authority, temporary visitation between the Petitioner's biological child, properly in the care of the Petitioner, and the Respondent, whom the Court found is a de facto parent of the child.

II. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts violated the Petitioner's fundamental right to rear her biological child without State interference by finding, without Petitioner's consent, that it was in the best interests of the child to have temporary visitation with the Respondent, who is a state-declared de facto parent.

III. Whether the lower court violated the Petitioner's Due Process rights by preventing the Petitioner the right to conduct an evidentiary hearing and the right to cross-examine the guardian ad litem before the court granted temporary visitation between the Petitioner's biological child and the Respondent, a state-declared de facto parent.

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES iii

JURISDICTION 1

RESTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

I. NO FINAL DECISION EXISTS WHERE THE VISITATION ORDER AT ISSUE IS INTERLOCUTORY AND TEMPORARY 4

II. THE SEPARATION OF POWERS ISSUE SET FORTH IN QUESTION ONE WAS NEITHER RAISED NOR DECIDED BELOW, DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND IS MERITLESS..... 6

III. THE PARENTAL RIGHTS ISSUE SET FORTH IN QUESTION TWO TURNS ON MATTERS OF STATE LAW AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION WHERE THE SJC AFFIRMED THE POWER OF THE FAMILY COURT, SITTING IN EQUITY, TO CONSIDER A CHILD'S BEST INTERESTS IN ALLOWING TEMPORARY VISITATION BETWEEN THE CHILD AND HIS DE FACTO PARENT..... 9

IV. THE PROCEDURAL DUE PROCESS ISSUE RAISED IN QUESTION THREE WAS NOT RAISED OR DECIDED BELOW, DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION, AND FAILS BECAUSE THE PETITIONER RECEIVED ALL OF THE PROCESS SHE WAS DUE..... 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Alison D. v. Virginia M., 77 N.Y.2d 651, 572 N.E.2d 27 (1991) 16

Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962) 17

C.C. v. A.B., 406 Mass. 679, 550 N.E.2d 365 (1990) ..8, 13

C.M. v. P.R., 420 Mass. 220, 649 N.E.2d 154 (1995) ..9, 14

Custody of Smith, 137 Wash.2d 1 (1998), *cert. granted sub nom. Troxel v. Granville*, 68 U.S.L.W. 3175 (U.S. Sept. 28, 1999) (No. 99-138) 5

Dept. of Banking v. Pink, 317 U.S. 264, 63 S.Ct. 233 (1942) 5

DeSylva v. Ballentine, 351 U.S. 570, 76 S.Ct. 974 (1956) 15

Dewey v. Dewey, 969 P.2d 1154 (Alaska 1999) 14

Dewey v. Dewey, 886 P.2d 623 (Alaska 1994) 14

Dreyer v. Illinois, 187 U.S. 71, 23 S.Ct. 28 (1902) 7

Duffey v. Duffey, 438 S.E.2d 445 (N.C. App. 1994) 14

Gardner v. Rothman, 370 Mass. 79, 354 N.E.2d 370 (1976) 8

Gilmore v. Gilmore, 369 Mass. 598, 341 N.E.2d 655 (1976) 17

Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 57 S.Ct. 549 (1937) 7

Ins. Co. v. Bangs, 103 U.S. 435 (1880) 8

Jacobs v. Jacobs, 507 A.2d 596 (Me. 1986) 11

TABLE OF AUTHORITIES – Continued

Page

Kulla v. McNulty, 472 N.W.2d 175 (Minn. App. 1991) 16

Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 2985 (1985) 10, 12

Logan v. Logan, 120 N.H. 839, 424 A.2d 403 (1980) 14

Lynda A.H. v. Diane T.O., 673 N.Y.S.2d 989 (1998) 16

Market St. Ry. v. Railroad Comm'n, 324 U.S. 548, 65 S.Ct. 770 (1945) 5

Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) 18

Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 94 S.Ct. 1323 (1974) 7

McGoldrick v. Compagnie Generale, 309 U.S. 430, 60 S.Ct. 670 (1940) 6

Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333 (1989) 11, 12

Miller v. Miller, 478 A.2d 351 (N.J. 1984) 14

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715 (1981) 7

Minnick v. Cal. Dept. of Corrections, 452 U.S. 105, 101 S.Ct. 2211 (1981) 5

M.L.B. v. S.L.J., 519 U.S. 102, 117 S.Ct. 555 (1996) 10

Mullane v. Central Hanover Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950) 17

Music v. Rachford, 654 S.2d 1234 (Fla. 1995) 16

New State Ice Co., v. Liebmann, 285 U.S. 262, 52 S.Ct. 371 (1932) 15

TABLE OF AUTHORITIES – Continued

Page

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 94 S.Ct. 407 (1973) 5

Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct. 1879 (1984) 15

Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944) 10

Quilloin v. Walcott, 434 U.S. 246, 98 S.Ct. 549 (1978), reh. den. 435 U.S. 918, 98 S.Ct. 1477 (1978) 11

Rivera v. Minnich, 483 U.S. 574, 107 S.Ct. 3001 (1987) 10

Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982) 10, 15

Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203 (1957) 7

West v. Superior Court, 69 Cal.Rptr.2d 160 (1997).... 16

Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972) 10

Wright v. Wright, 2 Mass. 109 (1806)..... 8

Youmans v. Ramos, 429 Mass. 774, 711 N.E.2d 165 (1999) 8

UNITED STATES STATUTES

28 U.S.C. § 1257 .....1, 5

STATE STATUTES

ARK. CODE ANN. § 9-13-102 (1999) 15

CAL. FAM. CODE § 3102 (West 1998)..... 15

TABLE OF AUTHORITIES – Continued

Page

CAL. FAM. CODE § 4059 (1999) 14
DEL. CODE ANN. tit. 13, § 501 (1998)..... 14
KY. REV. STAT. ANN. § 205.310 (1999)..... 14
ME. REV. STAT. ANN. tit. 19, § 2007 (1999)..... 14
MASS. GEN. L. ch. 209A 3
MASS. GEN. L. ch. 209C, § 1..... 13
MASS. GEN. L. ch. 211, § 3 4
MASS. GEN. L. ch. 231, § 118 4
1963 Mass. Acts ch. 820, § 1..... 7
MO. REV. ST. § 453.400 (1998)..... 14
NEB. REV. STAT. § 43-512 (2)(1998)..... 14
N.H. REV. STAT. ANN. § 167:2 (1998) 14
N.J. REV. STAT. ANN. § 9:2-7.1 (1999) 15
N.D. CENT. CODE § 14-08-09 (1999) 14
N.Y. DOM. REL. LAW § 71 (1999) 15
R.I. GEN. LAWS § 15-5-24.4 (1998). 15
S.D. CODIFIED LAWS ANN. § 25-7-8 (1999) 14
UTAH CODE ANN. § 62A-11-303 & 307.1 (1999)..... 14
UTAH CODE ANN. § 78-45-4.1 (1999)..... 14
VT. STAT. ANN. tit. 15, § 296 (1999) 14
WASH. REV. CODE ANN. § 26.16.205 (1998)..... 14
WASH. REV. CODE ANN. § 74.20A.020 (7) (1998) 14
WIS. STAT. ANN. § 49.195 (1999)..... 14

OTHER AUTHORITIES

Michael Grossberg, GOVERNING THE HEARTH (1985) 8

JURISDICTION

There is no "final judgment or decree" within the meaning of 28 U.S.C. § 1257 for this Court to review where the case below affirms an interlocutory order for temporary visitation and where further proceedings continue in the state courts.

RESTATEMENT OF THE CASE

The parties are two women who met in 1984 and shared a committed, monogamous relationship for thirteen years until their separation in May, 1998. App. 2, 4.[1] During their relationship, the parties availed themselves of every known legal mechanism for signifying their commitment to each other as "life partners." App. 2.

They dreamed of becoming parents from the time they met and, in 1991, decided to have a child biologically. App. 2. The parties decided that Petitioner – the older of the two women – would become pregnant through artificial insemination, and that Respondent would bear their second child. App. 2. Before the insemination process began, the parties attended workshops to learn about artificial insemination and parenting issues. App. 2. E.N.O. attended and participated in all of the insemination sessions as well as all medical decisions. App. 2.

[1] All references to the Appendix are to the Appendix contained in the Petition for Writ of Certiorari.

While the parties were still living in Maryland, L.M.M. became pregnant with B.O.M. in 1994. App. 2. Throughout L.M.M.'s difficult pregnancy, E.N.O. cared for her and accompanied L.M.M. on every visit with her doctors. App. 2-3.

When the child was born in February, 1995, E.N.O. acted as L.M.M.'s birthing coach and cut the child's umbilical cord. App. 3. Hospital staff treated E.N.O. as a mother, giving her a bracelet denoting her as a parent of "Baby O.-M.". App. 3.

B.O.M.'s last name consists of the parties' last names, and the parties sent out birth announcements naming them both as parents. App. 3. His first and middle names are for deceased relatives in E.N.O.'s family in accord with Jewish tradition. The child was welcomed into E.N.O.'s family as the first grandchild.

Before the child was born, and again afterward, the parties executed a co-parenting agreement in which they expressly stated their intent to co-parent the child. App. 3. The Agreement expressly acknowledged the possibility of the parents' separation and stated their intent that E.N.O. would continue to remain the child's parent even if L.M.M. and E.N.O. were to separate. App. 3. L.M.M. also executed documents authorizing E.N.O. to care for B.O.M. and act as a parent with respect to third parties. App. 3.

After B.O.M.'s birth, E.N.O. assumed most of the household and financial responsibilities. Later, for a seven-month period, E.N.O. was also the child's primary caretaker because L.M.M. was experiencing medical problems. The child, who is now approaching his fifth

birthday, calls E.N.O. "Mommy" and L.M.M. "Mama." He tells people that he has "two mothers". App. 3.

In September 1997, the couple moved to Massachusetts (App. 4), because it is a state where E.N.O. could legally become an adoptive parent without L.M.M. terminating her parental rights. In the Spring of 1998, however, the parties' relationship began to deteriorate. App. 4. After E.N.O. called an attorney about proceeding with a joint adoption, L.M.M. became angry and refused to meet with the attorney. The couple separated in May, 1998, and from that point forward L.M.M. sought to deny E.N.O. any access to the child. App. 4.

In June, 1998, L.M.M. obtained an ex parte temporary restraining order against E.N.O. pursuant to MASS. GEN. L. ch. 209A. Also in June, E.N.O. filed a complaint seeking enforcement of the co-parenting agreement, visitation with the child, and a winding down of the parties' financial affairs. App. 4.

In July, 1998, after a lengthy hearing in which the Probate and Family Court Judge questioned the parties and their attorneys, the temporary ex parte restraining order against E.N.O. was dismissed. A guardian ad litem appointed by the court also determined that E.N.O. posed no risk at all to the child.

Both the guardian ad litem as well as the attorney appointed to represent the child's interests concurred that E.N.O. acted in a parental capacity toward the child and that temporary visitation with her was in B.O.M.'s best interests. The guardian ad litem found that E.N.O. was an active parent and that "both mothers were clearly involved in [the child's] upbringing." App. 4-5. A judge

of the Probate and Family Court of Massachusetts ("Family Court") then ordered temporary visitation between the child and E.N.O., finding that such temporary visitation was in his best interests. App. 4.

L.M.M. availed herself of the Massachusetts statutory procedures for review of an interlocutory order. She first sought review by a single justice of the Massachusetts Appeals Court pursuant to MASS. GEN. L. ch. 231, § 118 (1st para.). The Single Justice of the Appeals Court vacated the Family Court order. App. 67-68. E.N.O. then sought review by a single justice of the Massachusetts Supreme Judicial Court ("SJC") pursuant to MASS. GEN. L. ch. 211, § 3. The SJC Single Justice agreed with the Family Court and reinstated visitation. App. 69-70. Upon further appellate review to the full SJC, four justices agreed with the Single Justice of that court and the Family Court ruling that the Probate and Family Court properly awarded temporary visitation to E.N.O. App. 5, 11. More particularly, the majority of the SJC agreed that the Family Court acted within its broad equitable jurisdiction which jurisdiction extended to awarding visitation between the child and E.N.O., whom it found to be B.O.M.'s de facto parent. App. 11.

REASONS FOR DENYING THE WRIT

I. NO FINAL DECISION EXISTS WHERE THE VISITATION ORDER AT ISSUE IS INTERLOCUTORY AND TEMPORARY.

This Court may not review the judgment below where it is not a final judgment or decree. 28 U.S.C.

§ 1257. Here, the rights of the parties have not been fully adjudicated and the Massachusetts courts have not concluded with the matter. *Market St. Ry. v. Railroad Comm'n*, 324 U.S. 548, 551, 65 S.Ct. 770, 772-73 (1945); *Dept. of Banking v. Pink*, 317 U.S. 264, 268, 63 S.Ct. 233, 235 (1942). In upholding an interlocutory visitation order for three hours per week of contact between E.N.O. and the child (App. 71), the SJC emphasized that "[t]he visitation order is temporary and may be altered or even vacated on a trial on the merits." App. 16 n.13.

Facts remain to be developed which would clarify or eliminate any constitutional issues. *Minnick v. Cal. Dept. of Corrections*, 452 U.S. 105, 127, 101 S.Ct. 2211, 2223 (1981). The proceedings now pending before the Family Court could reveal, for example, that L.M.M. is physically unable to care for the child at all. The finality rule bars this Court's piecemeal review of this case and must deter this Court from revisiting the SJC's determination of the issues. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159, 94 S.Ct. 407, 410 (1973). In short, this Court has no role to play until the Massachusetts courts finally resolve the underlying matter.[2]

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[2] This Court should not hold this case pending its determination in *Custody of Smith*, 137 Wash.2d 1 (1998), *cert. granted sub nom. Troxel v. Granville*, 68 U.S.L.W. 3175 (U.S. Sept. 28, 1999) (No. 99-138). The decision below is not final and *E.N.O.*, unlike any issues raised in *Troxel*, involves a conflict between two parents. *See* Section III, below.

II. THE SEPARATION OF POWERS ISSUE SET FORTH IN QUESTION ONE WAS NEITHER RAISED NOR DECIDED BELOW, DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND IS MERITLESS.

This Court will not consider an issue that was neither raised below nor considered or decided by the Massachusetts Supreme Judicial Court. *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434, 60 S.Ct. 670, 672 (1940). The Petitioner below argued that the power to award visitation in this context must be specifically expressed in a state statute and that no statute does so. The SJC agreed that no specific statute covered this factual situation, but disagreed that the absence meant no relief for E.N.O. App. 5 n.3. Rather, the SJC held that the legislature's statutory grant of equity jurisdiction to the Family Court was broad enough to encompass the temporary visitation order in this case. App. 6-7. In short, the SJC interpreted Massachusetts statutory law more expansively than Petitioner believed proper. The Petitioner's argument went no further. Specifically, at no time did Petitioner assert that if the SJC affirmed the Family Court's exercise of its admittedly broad equity jurisdiction (which jurisdiction is conferred by statute), then such exercise would contravene federal separation of powers principles. App. 5-8. For this simple reason alone, Question One is not properly presented for review.

Even assuming Question One was properly pressed or passed on below, the Petitioner presents no federal constitutional claim in raising an issue of supposed state separation of powers violations by the SJC's decision.

States' freedom from federal separation of powers constraints is an essential ingredient of federalism. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 & n.13, 94 S.Ct. 1323, 1331 & n.13 (1974); *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 77 S.Ct. 1203, 1214 (1957) ("the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.") (citing *Dreyer v. Illinois*, 187 U.S. 71, 84, 23 S.Ct. 28, 32 (1902)).

Nothing in the federal constitution prevents a state from allocating lawmaking powers to the courts. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 479-81, 101 S.Ct. 715, 732 (1981) (Stevens, J., dissenting on other grounds) ("I know of nothing in the Federal Constitution that prohibits a State from giving lawmaking power to its courts. . . . The functions that a state court shall perform within the structure of state government are unquestionably matters of state law."); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612, 57 S.Ct. 549, 551 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.") (Cardozo, J.).[3]

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[3] The dissent below is simply mistaken when it complains the SJC decision infringes on the province of the legislature. App. 17. While the dissent may prefer the legislature make such decisions as a matter of policy, the dissent is not complaining of a constitutional violation. The equitable powers exercised by the Family Court and affirmed by the SJC were granted to the courts by the Massachusetts Legislature. 1963 Mass. Acts ch. 820, § 1. App. 5. In any event, if the Legislature disagrees with the rule of law announced in the *E.N.O.* decision, it may modify that decision.

As a result, even assuming for the sake of argument alone that the SJC arrogated a power properly belonging to the Legislature (or that the Legislature improperly delegated broad lawmaking powers to the SJC), that is no concern of this Court.

Finally, it is not this Court's role – because it would be inordinately disruptive – to inject itself into the law-making process in Massachusetts or any other state. Any claim of novelty concerning the decision below is nothing more that the discomfort over the evolution of the common law, a discomfort aroused by the Massachusetts courts' vigorous exercise of their equitable powers over the years.[4] *See e.g. Wright v. Wright*, 2 Mass. 109 (1806) (court exercised discretionary powers to place "bastard" child with the mother rather than to make the child a ward of the Commonwealth); *Gardner v. Rothman*, 370 Mass. 79, 80, 354 N.E.2d 370, 371-72 (1976) (upholding court's equitable powers to allow unwed fathers to make claims for visitation with their children before Massachusetts enacted a paternity statute); *C.C. v. A.B.*, 406 Mass. 679, 550 N.E.2d 365 (1990) (using equity to allow standing to a putative father where the mother of the child was married to another man); *Youmans v. Ramos*, 429

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[4] The Family Court's use of its equitable and parens patriae powers to achieve a just result for the child enjoys an historical pedigree in Massachusetts and elsewhere. *Compare* App. 6-8 with App. 17 and Petition 13-15. *See generally*, Michael Grossberg, GOVERNING THE HEARTH 236-37, 255-59 (1985); *Ins. Co. v. Bangs*, 103 U.S. 435, 438 (1880) (explaining origin of the doctrine which allows courts to act as the protector of the persons and estates of children).

Mass. 774, 711 N.E.2d 165 (1999) (upholding court's equitable powers to award visitation between a child and the aunt who had raised her for eleven years after the child's father resumed custody).[5]

Therefore, this Court should not interfere with the development of state common law.

III. THE PARENTAL RIGHTS ISSUE SET FORTH IN QUESTION TWO TURNS ON MATTERS OF STATE LAW AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION WHERE THE SJC AFFIRMED THE POWER OF THE FAMILY COURT, SITTING IN EQUITY, TO CONSIDER A CHILD'S BEST INTERESTS IN ALLOWING TEMPORARY VISITATION BETWEEN THE CHILD AND HIS DE FACTO PARENT.

The precise constitutional question presented is whether L.M.M.'s federal due process rights are absolute

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[5] There is nothing odd about the result the SJC reached in *E.N.O.* compared with the decision in *C.M. v. P.R.*, 420 Mass. 220, 649 N.E.2d 154 (1995). *Compare* App. 10-11 to App. 18, 21-22. The instant case proceeded on a lengthy verified complaint accompanied by multiple exhibits all demonstrating the parental nature of the relationship between E.N.O. and B.O.M. By contrast, the record in C.M.'s case "consist[ed] of a complaint filled in by check marks on a form and the admission by the plaintiff that he is not the biological father." 420 Mass. at 220 n.1, 649 N.E.2d at 154 n.1. The SJC refused C.M. equitable relief reasoning that "[h]is devotion to the child does not, without more, permit an adjudication of paternity or visitation privileges." 420 Mass. at 223, 649 N.E.2d at 156. The cases are easily reconciled by the fact that this case presents the "more" that was missing in *C.M.*

or nearly so, enabling her to bar visitation between B.O.M. and E.N.O. where the state courts have found E.N.O. to be a de facto parent and that contact (at least on a temporary basis) would be in the child's best interests.

This question was not pressed by Petitioner below. L.M.M. never asserted that it would be unconstitutional for the SJC to find E.N.O. to be a de facto parent, but instead characterized the case as one involving a third party's intrusion on parental rights. In answering that latter question, the SJC balanced the interests of the child in maintaining contact with E.N.O. against the asserted rights of L.M.M. App. 14-15. But the SJC, for want of proper presentation, has never had the opportunity to consider whether there are restraints on its ability to fashion rules defining de facto parenthood at all.

Even assuming a question is properly presented to this Court, it is axiomatic that parental rights are not absolute. *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985 (1985); *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944). Nor does this case involve the state attempting to break up a family or terminate parental rights. *M.L.B. v. S.L.J.*, 519 U.S. 102, 118, 117 S.Ct. 555, 564 (1996); *Santosky v. Kramer*, 455 U.S. 745, 768-69, 102 S.Ct. 1388, 1402-03 (1982).[6] Disputes over visitation between

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[6] *Compare Rivera v. Minnich*, 483 U.S. 574, 579-81, 107 S.Ct. 3001, 3004-06 (1987) (due process requires only preponderance of evidence standard of proof in paternity proceedings as opposed to more stringent clear and convincing standard required in termination proceedings because imposition of parent-child obligations is a less severe consequence than termination of rights).

parents, as is the case here, do not partake of the constitutional concerns raised in visitation cases involving third parties. *See e.g. Jacobs v. Jacobs*, 507 A.2d 596 (Me. 1986). The result of the SJC decision is simply to give some recognition to the family unit the child has known his entire life. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 555 (1978), reh. den. 435 U.S. 918, 98 S.Ct. 1477 (1978).[7]

More particularly, any federal question concerning whether a state's acknowledgement of parental rights in a non-biological parent infringes on a biological parent's rights presented in this case has already been asked and answered by *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333 (1989) (plurality). That case addressed whether a California evidence rule in paternity cases deprived a putative father of his liberty interest in maintaining a relationship with a child he biologically fathered where the child's mother was married to another man at the time of conception and birth. The evidence rule provided that a child born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage; and the presumption could

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[7] *Quilloin* upheld a Georgia adoption statute which allowed a woman and her new husband to adopt the child she had previously had with another man over that man's objection. Due process was satisfied by the findings that the adoption, and denial of the former partner's request for legitimation, were in the best interests of the child. *Id.* 434 U.S. at 255, 98 S.Ct at 555. As this Court stated, "[T]he result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant [i.e, the biological father]." *Id.*

be rebutted only in very limited circumstances by either the husband or the mother. *Id.* 491 U.S. at 115, 109 S.Ct. at 2338. Absent those circumstances, the presumption was irrebuttable regardless of the actual identity of the biological father; and he had no ability to challenge the presumption. In other words, California had enacted a substantive rule of law eliminating any facts about biological paternity as an issue. *Id.*, 491 U.S. at 119, 109 S.Ct. at 2340.

Unable to satisfy the conditions of the California statute which would trigger the right to rebut the presumption of the husband's paternity, the biological father claimed a deprivation of liberty. This Court rejected his claim and deferred to California's overriding social policy concerns about support for the child and maintaining the integrity of the family unit. *Id.*, 491 U.S. at 119-20, 109 S.Ct. at 2340. The fact that the evidence rule preferred the husband and precluded the biological father from rebutting the presumption of the husband's paternity raised no constitutional concern. *Id.*, 491 U.S. at 130, 109 S.Ct. at 2345. "It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted." *Id.*, 491 U.S. at 129-30, 109 S.Ct. at 2345. Stated differently, in *Michael H.*, this Court answered that it would defer to state laws crafting an acknowledgement of parental rights, even if those parents may not be biologically related to their children. *See also Lehr v. Robertson*, 463 U.S. 248, 262-63, 103 S.Ct. 2985, 2994 (1985).

Just as this Court recognized California's power to define a non-biological husband as a parent, the same

must hold true for Massachusetts and its conclusion that E.N.O. is a de facto parent. Just as California sought to protect the unitary family, the Massachusetts courts have sought to protect the family of the Petitioner, Respondent and their child. App. 9. The *E.N.O.* decision follows from strong and long-evolving child-protective principles in Massachusetts law. App. 9, 15-16.[8] It makes not a whit of difference that the rule of law at issue was articulated through a court decision rather than a statute where the decision is consistent with other positive law in the Commonwealth. *See e.g.* MASS. GEN. L. ch. 209C, § 1 (children born to unmarried parents shall have the same rights and protections of the law as all other children). There is nothing more to review here than in the myriad other

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[8] The Massachusetts standards for establishing de facto parenthood are stringent and provide a tight screening mechanism.

> A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. . . . The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide.

App. 8-9. Even if one is a de facto parent, the child's relationship with the de facto parent must be further evaluated in determining what is in the child's best interests. *See C.C. v. A.B.*, 406 Mass. 679, 550 N.E.2d 365 (1990) (setting forth factors).

cases and statutes allocating parental responsibilities or prerogatives to persons who, while parents, are not biological or adoptive parents.[9] As this Court stated in

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[9] Despite the old common law rule that stepparents have no duty to support their stepchildren, several states have imposed just such an obligation despite the absence of a biological or adoptive link between the stepparents and children. Sometimes the duty is generalized and indefinite while other states provide the duty may be terminated upon divorce. *See e.g.* MO. REV. ST. § 453.400 (1998); N.D. CENT. CODE § 14-08-09 (1999); S.D. CODIFIED LAWS ANN. § 25-7-8 (1999); UTAH CODE ANN. § 78-45-4.1 (1999); WASH. REV. CODE ANN. § 26.16.205 (1998). Some states impose the obligation of support on stepparents only when the parents are unable to meet the minimum needs of the child. *See e.g.* DEL. CODE ANN. tit. 13, § 501 (1998); VT. STAT. ANN. tit. 15, § 296 (1999). Some states take into account the income of the current spouses or associates of a party in modifying child support obligations or deviating from state support guidelines. *See e.g.* CAL. FAM. CODE § 4059 (1999); ME. REV. STAT. ANN. tit. 19, § 2007 (3)(J) (1999); *Logan v. Logan*, 120 N.H. 839, 424 A.2d 403 (1980). Still other states require the stepparent to support families receiving public assistance or allow the state to recover the expenses of public support from stepparents. *See e.g.* KY. REV. STAT ANN. § 205.310 (1999); NEB. REV. STAT. § 43-512 (2) (1998); N.H. REV. STAT. ANN. § 167:2 (1998); UTAH CODE ANN. § 62A-11-303 & 307.1 (1999); WASH. REV. CODE ANN. § 74.20A.020 (7) (1998); WIS. STAT. ANN. § 49.195 (1999). Some states use principles of equitable estoppel to bar a divorcing stepparent from denying a post-divorce obligation to support his or her stepchildren. *See e.g. Miller v. Miller*, 478 A.2d 351, 357-58 (N.J. 1984). Finally, some states have held stepparents liable for post-divorce support through contract. *See Dewey v. Dewey*, 969 P.2d 1154 (Alaska 1999); *Dewey v. Dewey*, 886 P.2d 623 (Alaska 1994); *Duffey v. Duffey*, 438 S.E.2d 445 (N.C. App. 1994).

In all likelihood, stepparents and others required to support children to whom they are not biologically or legally related have some rights of visitation. *See C.M. v. P.R.*, 420 Mass. 220, 224 n.7, 649 N.E.2d 154, 156 n.7 (1995) ("in fairness and logic," a

Palmore v. Sidoti, granting parental rights "based on the best interests of the child is indisputably a substantial governmental interest." 466 U.S. 429, 433, 104 S.Ct. 1879, 1882 (1984) (equal protection analysis).

In addition to federalism concerns, as a matter of judicial restraint, this Court should be extremely loath to intrude upon, or re-open, questions of state law. *Santosky v. Kramer*, 455 U.S. 745, 770, 102 S.Ct. 1388, 1403-04 (Rehnquist, J., dissenting) (domestic relations "has been left to the States from time immemorial, and not without good reason"); *DeSylva v. Ballentine*, 351 U.S. 570, 580, 76 S.Ct. 974, 980 (1956) (state law controlling on meaning of term "child" in federal copyright statute). The fact that states may view these matters differently shows that our federal system is working. *Santosky*, 455 U.S. at 773, 102 S.Ct. at 1405 (Rehnquist, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.") (quoting *New State Ice Co., v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386 (1932) (Brandeis, J., dissenting)).[10]

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person required to support a child "should be entitled in return to assert rights of custody and visitation.").

Sibling visitation statutes are another area in which several states have seen fit to limit a parent's right to bar visitation which is in the child's best interests. *See e.g.* ARK. CODE ANN. § 9-13-102 (1999); CAL. FAM. CODE § 3102 (West 1998); N.J. REV. STAT. ANN. § 9:2-7.1 (1999); N.Y. DOM. REL. LAW § 71 (1999); R.I. GEN. LAWS § 15-5-24.4 (1998).

[10] *Cf. Palmore v. Sidoti*, 466 U.S. 429, 431-32, 104 S.Ct. 1879, 1881 (1984) (while custody case is "not ordinarily a likely

Finally, contrary to Petitioner's assertion, there is no relevant conflict, vis-a-vis this Court's role, among the states on the issue decided below. What does exist is variety among each state's legal structures reflecting in each case a unique blend of common law, statutes, and different balances of power as between the courts and legislatures. In accord with each state's unique structure concerning law and policy, resolutions of particular cases like the one here will inevitably be decided differently.[11] That is no concern of this Court; again, it is an example of the state laboratories in action.

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candidate for review by this Court[,]" the case raised "important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.").

[11] Cases cited by L.M.M. from other jurisdictions in which courts denied standing to a person in E.N.O.'s position all involved the interpretation of particular statutes in those states where the statutory schemes were deemed exclusive. *See e.g. West v. Superior Court*, 69 Cal.Rptr.2d 160, 162 (1997) (turning on interpretation of the Uniform Parentage Act); *Lynda A.H. v. Diane T.O.*, 673 N.Y.S.2d 989, 991 (1998) (turning on exclusivity of New York statutory scheme); *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27 (1991) (same); *Music v. Rachford*, 654 S.2d 1234, 1235 (Fla. 1995) (per curiam) (turning on lack of equitable authority to award visitation in courts); *Kulla v. McNulty*, 472 N.W.2d 175, 182 (Minn. App. 1991) (turning on interpretation of a visitation statute without even addressing court's equitable powers). By contrast, courts with broader equitable powers have issued rulings consistent with that of the SJC in this case. *See* Pet. at 17-18.

IV. THE PROCEDURAL DUE PROCESS ISSUE RAISED IN QUESTION THREE WAS NOT RAISED OR DECIDED BELOW, DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION, AND FAILS BECAUSE THE PETITIONER RECEIVED ALL OF THE PROCESS SHE WAS DUE.

Petitioners below did not assert a right to cross-examine the guardian ad litem based on any constitutional notion of procedural due process. While they did complain about being denied an opportunity to cross-examine the guardian ad litem at the hearing on the temporary visitation motion, the Petitioner did not raise, and the SJC did not consider or decide, the cross-examination issue in light of federal constitutional principles. Accordingly, this Court will not now take up the question. *Beck v. Washington*, 369 U.S. 541, 549-50, 82 S.Ct. 955, 960 (1962).

Nor does Question Three present a substantial federal question, especially where petitioner received notice of the temporary visitation motion, and a neutral hearing judge of the Massachusetts Family Court conducted a hearing on the matter at which counsel for both parties was heard. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313-314, 70 S.Ct. 652, 657 (1950). The guardian ad litem's report to the judge at the temporary hearing was an interim one and the parties will later have an opportunity to cross-examine the guardian ad litem on her complete and final report. *Gilmore v. Gilmore*, 369 Mass. 598, 341 N.E.2d 655 (1976). Requiring family courts at the initial temporary motion hearings to conduct those hearings with testimony and full cross-examination of court

appointed guardians ad litem would both increase the cost of the process dramatically and stall even temporary resolution of visitation and support matters for the child. While Massachusetts could elect to utilize such a process, it is not constitutionally required. *Matthews v. Eldridge*, 424 U.S. 319, 332-50, 96 S.Ct. 893, 901-910 (1976). In short, even if any procedural due process issue were raised by the case below, it fails to come within the class of cases deemed compelling for this Court's review.

CONCLUSION

The Petition should be denied.

RESPECTFULLY SUBMITTED this 27th day of October, 1999.

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No. 99-531

In The

Supreme Court of the United States

L.M.M.,

Petitioner,

v.

E.N.O.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

REPLY BRIEF

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488

I. THE MASSACHUSETTS SUPREME JUDICIAL COURT'S DECISION GRANTING VISITATION BETWEEN L.M.M.'S BIOLOGICAL MINOR CHILD AND E.N.O., BY EXPANDING ITS JUDICIAL AUTHORITY AND ADOPTING THE PREVIOUSLY UNRECOGNIZED PRINCIPLE OF DE FACTO PARENTHOOD, IS A FINAL JUDGMENT IN ACCORDANCE WITH 28 U.S.C. § 1257.

E.N.O. correctly points out that this Court's jurisdiction to review a state judgment is confined to a final judgment pursuant to 28 U.S.C. § 1257. However, E.N.O. improperly recognizes that "final" has been defined by this Court as: "[the judgment] must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market St. Ry. Co. v. Railroad Commission of State of California,* 324 U.S. 548, 551, 65 S.Ct. 770, 772-73 (1945).

Consistent with this Court's interpretation of "final", the Massachusetts Supreme Judicial Court's decision is the "final word of a final court." The issue at bar is not whether visitation between E.N.O. and B. would be in B.'s best interests. Rather, the issue is whether the court violated the Separation of Powers doctrine and L.M.M.'s constitutional rights by granting visitation, without express statutory authority, between L.M.M.'s biological child, who is properly in L.M.M.'s custody, and E.N.O., who is neither the biological nor adoptive parent.

As a result of the court's decision to grant such visitation based on its purported equity jurisdiction and

the previously unrecognized principle of de facto parenthood, E.N.O. (as well as other legal strangers) can henceforth have standing to petition a Massachusetts' court for visitation with a non-biological child against the child's biological mother or father.

II. THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO CONSIDER THE SEPARATION OF POWERS ISSUE, THE FUNDAMENTAL RIGHT ISSUE AND THE PROCEDURAL DUE PROCESS ISSUE, AS ALL SUCH CONSTITUTIONAL ISSUES WERE CONSIDERED BY THE MASSACHUSETTS SUPREME JUDICIAL COURT.

L.M.M. recognizes that this Court, in the exercise of appellate jurisdiction, will only, except in rare occasions, consider issues that were raised or decided in the state's highest court whose judicial action this court is requested to review. *McGoldrick v. Compagne General Transatlantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 672-73 (1940). *See In re Linda Coal and Supply Co.*, 255 F.2d 653, 656 (1958) (discussing appellate court's jurisdiction confined to questions presented from lower court or implicit in court's decision).

The record before this Court demonstrates that the dissenting opinion of the Massachusetts Supreme Judicial Court, which comprised of one-third of the justices, discussed in depth that the majority's decision based on its purported "equity" jurisdiction and de facto parenthood principle was "a remarkable example of judicial lawmaking", "denigration of parental rights" and "the judicial infringement on the province of the Legislature effected by the court's decision." (App. 17). Indeed, the dissenting

opinion vigorously focused their opinion on their belief that the court violated the Separation of Powers doctrine and L.M.M.'s Fundamental Right to rear her child without state intervention. (App. 17-29). The court also acknowledged L.M.M.'s protestation that the visitation order "restricts her fundamental right, as a fit parent, to the custody of her child." (App. 14-16).

Moreover, at oral argument before the Supreme Judicial Court, L.M.M.'s counsel was confronted with the issue regarding the court's "equity" jurisdiction, including whether such jurisdiction violated the court's authority (i.e. the Separation of Powers doctrine).

It is also apparent in the court's decision that L.M.M. raised, and the court decided the issue of whether L.M.M.'s procedural due process rights were violated as a result of the lower court's refusal to allow her to conduct an evidentiary hearing and allow her the opportunity to cross-examine the Guardian ad Litem before the court granted visitation. (App. 16, fn 13). Specifically, the court addressed L.M.M.'s argument, distinguishing between the present case and *Gilmore v. Gilmore*, 369 Mass. 598, 341 N.E.2d 655 (1976), which L.M.M. cited to support her argument. (App. 16, fn 13). The *Gilmore* Court found that the appellant's procedural due process rights were violated as a result of the lower court's refusal to allow the Guardian ad Litem to testify, thereby improperly denying the appellant the ability to cross-examine the Guardian ad Litem. *Id.* at 604-05, 341 N.E.2d at 659.

Simply put, the Massachusetts Supreme Judicial Court expressly discussed and consequently, decided the case, inter alia, on the same constitutional issues L.M.M.

has properly raised in her Petition for Writ of Certiorari. Accordingly, this Court has jurisdiction to consider whether the Supreme Judicial Court's decision violated the Separation of Powers doctrine, L.M.M.'s Fundamental Rights and her Procedural Due Process Rights.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted.

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